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No. 75-1234

In the Supreme Court of the United States

OCTOBER TERM, 1975

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

EVELYN ELLIOTT, ET AL.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

FANNIE BUFFINGTON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the Secretary of Health, Education, and Welfare, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-45a) is not yet reported. The opinion of the district court (App. C, *infra*, pp. 50a-79a) in *Elliott* v. *Weinberger* is reported at 371 F. Supp. 960. The order (App. D, *infra*, pp. 81a-84a) of the district court (no opinion having been delivered) in *Buffington* v. *Weinberger* is not yet reported.

JURISDICTION

The judgments of the court of appeals (App. B, *infra*, pp. 46a-49a) were entered on October 1, 1975. On December 17, 1975, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including February 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district courts lacked jurisdiction over these class actions.

2. Whether the Due Process Clause requires that an oral hearing be held before, rather than after, a social security beneficiary's payments are reduced in order to recoup an erroneous overpayment.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

Section 204 of the Social Security Act, 49 Stat. 624, as amended, 42 U.S.C. 404, and the regulations of the Department of Health, Education, and Welfare, are set forth in pertinent part in App. E, *infra*, pp. 85a-94a.

STATEMENT

1. Section 204(a)(1) of the Social Security Act, 42 U.S.C. 404(a)(1), provides that in the event of an erroneous overpayment to a Social Security beneficiary, "proper adjustment or recovery shall be made, under regulations prescribed by the Secretary [of Health, Education, and Welfare] * * * [by] decreas[ing] any payment under this subchapter [relating to old-age, survivors', and disability insurance] to which such overpaid person is entitled." Section 204(b) of the Act further provides, however, that "there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." This case concerns the constitutional validity, under the Due Process Clause, of the procedures used by the Secretary in enforcing and giving effect to these statutory provisions.

Under the Secretary's procedures, once the Secretary has initially determined that an overpayment has been made, the recipient is notified of the deter-

mination and given an opportunity to contest the determination in writing and, in addition or in the alternative, to request that the Secretary waive recovery in accordance with Section 204(b) of the Act. He is invited to discuss his case with the local Social Security office. See 20 C.F.R. 404.907-404.913 (App. E, *infra*, pp. 87a-91a). Adjustment or recovery is deferred pending review of the initial determination. Sections 5503.3 and 5503.5 of the Social Security Claims Manual (App. E, *infra*, pp. 85a-87a). If the Secretary decides upon review that the initial determination of an overpayment was correct and that waiver of recovery is not warranted, recovery is effected by decreasing the beneficiary's subsequent monthly benefit payments until the overpayment has been recouped, as provided by Section 204(a)(1) of the Act (App. E, *infra*, pp. 92a-94a).

Following the Secretary's decision upon this initial review, the beneficiary is entitled to further administrative review, including a full evidentiary hearing. 20 C.F.R. 404.917 (App. E, *infra*, p. 92a). If, following the hearing, it is determined that there had been no overpayment, or that the beneficiary was entitled to waiver of recovery, the beneficiary's withheld payments are repaid and his subsequent payments restored to the appropriate level.

2. This petition arises out of two lawsuits initiated, respectively, in the United States District Court for the Western District of Washington (*Buffington, et al.* v. *Weinberger*, No. 734-73C2, affirmed in part, reversed in part, No. 74-3118, C.A. 9, petition for rehearing pending), and the United States District Court for the District of Hawaii (*Elliott, et al.* v. *Weinberger*, Civ. No. 72-3629, affirmed in part, reversed in part, No. 74-1611, C.A. 9, petition for rehearing pending). Both cases present the same issues, and were consolidated by the court of appeals for decision.[1]

The named respondents in *Buffington*, Mrs. Buffington and Mrs. Biner, are recipients of social security retirement benefits.[2] The Secretary determined that respondents had received an overpayment and

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[1] Respondents submitted an untimely petition for rehearing in the court of appeals, which the court filed for disposition on the merits. The untimely filing of a petition for rehearing in the court of appeals, if entertained on the merits, ordinarily extends the time for filing a petition for certiorari. *Bowman* v. *Loperena*, 311 U.S. 262; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144. However, this Court has also suggested that the time may not be extended with respect to matters ruled upon by the court of appeals which are not put in issue by either party in the petition for rehearing. *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206; see also *United States* v. *Adams*, 383 U.S. 39. In the instant case, the government did not seek rehearing with regard to jurisdiction or to that portion of the court of appeals' decision holding that an evidentiary hearing was required in overpayment cases involving matters of credibility. Respondents seek by rehearing to extend that requirement to all overpayment cases, whether testimonial evidence is necessary or not. Accordingly, the district court's jurisdiction and that portion of the court of appeals' judgment which requires a prerecoupment hearing in cases involving matters of credibility are not subject to review on the petition for rehearing.

[2] The issues in both *Buffington* and *Elliott* are identical. For the sake of conciseness, we describe the facts in *Buffington* in the text and discuss those in *Elliott* in related footnotes.

sought to recoup it. The determination was made on the basis of annual reports of excess earnings filed pursuant to a statutory directive (42 U.S.C. 403(h)), which requires a beneficiary to file such reports when his earnings exceed the statutory maximum (see 42 U.S.C. 403(f)).[3]

The amount of Mrs. Buffington's overpayment was $78.60. She was notified of the overpayment on October 3, 1973, and the $78.60 was withheld from her November 1973 check. She then requested reconsideration by the Secretary, who sustained the overpayment determination (App. A, *infra*, p. 9a). On October 22, 1974, the district court ordered the Secretary to restore to respondent the amount recouped from her until she was given the opportunity for a hearing (App. D, *infra*, p. 84a).

The amount of respondent Biner's overpayment was $2,216.20, representing the total amount of benefits she had received during 1972. After the Secre-

[3] The finding of overpayments to three of the named respondents in *Elliott*, Mr. Silva, Mr. Vaquilar, and Mrs. Ortiz, also were based upon reports of excess earnings (App. C, *infra*, pp. 54a-55a). The overpayments to the other named respondents had been mistakenly made for other reasons: Mrs. Elliott received both retirement and disability benefits when she was entitled only to disability payments; Mr. Gaines received duplicate checks for the same benefit period; and Mrs. Yamasaki was overpaid due to a processing error (App. C, *infra*, pp. 57a-59a). All of the respondents sought reconsideration and waiver from the Secretary but initiated this lawsuit before those requests could be acted upon. All monies recovered from respondents have been restored to them by order of the district court (App. C, *infra*, p. 78a).

tary's initial determination of an overpayment, Mrs. Biner twice requested reconsideration and also requested that the overpayment be waived. After considering Mrs. Biner's submissions, the Secretary adhered to his decision that recovery of the overpayment was appropriate (App. A, *infra*, pp. 10a-12a).[4] After the institution of this suit, Mrs. Biner received an oral hearing before an administrative law judge, who sustained the Secretary's decision (id. at 12a).

On December 11, 1973, respondents Buffington and Biner brought this suit as a class action, contending that the Secretary's procedures for recovering overpayments fail to provide due process since they do not afford claimants a pre-recoupment oral hearing. The district court determined that it had jurisdiction under the Mandamus Act, 28 U.S.C. 1361, and certified the case as a class action of nationwide extent, defining the class to consist of all individuals eligible for old age and survivors' benefits whose benefits have been or will be reduced or otherwise adjusted

[4] In denying Mrs. Biner's request for waiver, the Secretary found Mrs. Biner at fault in retaining the benefit checks. Mrs. Biner had worked throughout 1972 and had earned over $7,000 for the year—a sum that precluded eligibility for any benefit payments. Mrs. Biner did not, however, file a report of excess earnings for that year. The Secretary subsequently learned from Mrs. Biner's employer that she had excess earnings, and requested that she file an earnings report. When she did so, the overpayment was determined. On the basis of these facts, the Secretary concluded that Mrs. Biner was not without fault in receiving the overpayment and therefore refused to waive recoupment (Affidavit of Forbus, Deputy Director, Bureau of Retirement and Survivors' Insurance, Social Security Administration; App. A, *infra*, pp. 10a-12a).

without notice and opportunity for a prior hearing (App. A, *infra*, p. 15a; district court order of April 4, 1974).[5] The district court declared the Secretary's recoupment procedure unconstitutional and enjoined the Secretary from recovering any overpayment from members of the class "without affording them an opportunity for a hearing before any recoupment or adjustment is effected" (App. D, *infra*, p. 82a).

In the *Elliott* case, the respondents brought suit challenging the constitutionality of the Secretary's recoupment procedures on the same basis as the respondents in *Buffington*. The district court in *Elliott* declared the recoupment procedure unconstitutional and enjoined the Secretary from recovering overpayments from beneficiaries residing in Hawaii (App. C, *infra*, pp. 54a-55a, 73a, 78a).

The court of appeals consolidated these cases for decision and affirmed the holdings of the district courts with regard to jurisdiction and the propriety of class relief. The court further affirmed the holdings that the Secretary's recoupment procedures are unconstitutional but vacated and remanded the cases to the district courts for the entry of more limited orders that would require a prior oral hearing only where the Secretary's determination might turn upon the credibility of witnesses.[6]

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[5] The class order was later modified so as to exclude groups of beneficiaries whose claim to a prior hearing was already the subject of litigation in other courts (App. A, *infra*, p. 15a; district court order of October 29, 1974).

[6] For purposes of convenience, the court distinguished two categories of overpayment disputes, "reconsideration" cases and "waiver" cases. "Reconsideration" cases generally involve the correctness of the Secretary's determination that an overpayment has occurred (*e.g.*, whether the computation of an earnings statement is correct, or whether two benefit checks have been received rather than one) and ordinarily can be decided on the basis of documentary evidence. In "waiver" cases, however, the court concluded that issues of credibility are often involved in determining whether a claimant was at fault in receiving an overpayment. The court determined, however, that the constitutional necessity of a prior hearing turns upon the particular facts of each case and not upon whether the case is one of "reconsideration" or "waiver" (App. A, *infra*, pp. 36a-43a).

REASONS FOR ALLOWING THE WRIT

The questions presented by this petition are identical to those raised by the petition for a writ of certiorari pending before the Court in *Mathews* v. *Mattern, et al.*, No. 75-649,[7] and this petition should be granted for the reasons advanced in support of the petition in *Mattern*.[8]

[7] We are furnishing counsel for the respondents with copies of our petition in *Mattern*, and with copies of our briefs in *Mathews* v. *Eldridge*, No. 74-204, decided February 24, 1976, and *Norton* v. *Mathews*, No. 74-6212, upon which we in part rely in *Mattern*.

[8] When we filed our petition for certiorari in *Mattern*, we informed the Court that the Secretary was in the process of complying with the outstanding injunctions in these cases by informing all overpaid beneficiaries that upon request they would receive an evidentiary hearing before recoupment is initiated. The Secretary had not then had an opportunity to analyze the response to the new procedure. An analysis has now been made of the first few months' experience with that procedure, and we are informed that the number of requests for pre-recoupment hearings has not been as great as anticipated.

Moreover, this Court in *Mathews* v. *Eldridge*, No. 74-204, decided February 24, 1976, rejected on the merits a claim that due process requires an evidentiary hearing before Social Security disability payments may be terminated. The decision below appears inconsistent with *Eldridge* on that issue.[9]

[9] Although the Court found that the district court had jurisdiction under 42 U.S.C. 405(g) to consider Eldridge's constitutional claims, that finding was based in substantial part on the fact that he had "at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments" (slip op., p. 9; footnote omitted). No similar claim can be asserted by respondents here. Moreover, even if the district court below had jurisdiction over some of the named plaintiffs under *Eldridge*, for the reasons discussed in our *Norton* brief it lacked jurisdiction over the class members and the named plaintiffs in *Elliott* who failed to exhaust the Secretary's pre-recoupment procedures (see *Eldridge*, *supra*, slip op., pp. 6-10).

CONCLUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari in *Mathews* v. *Mattern*, *supra*, the petition for a writ of certiorari should be granted and these cases disposed of in accordance with the disposition of *Mattern*.

Respectfully submitted.

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FEBRUARY 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1611

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all others similarly situated,
PLAINTIFFS-APPELLEES

vs.

CASPAR W. WEINBERGER, Individually and in his capacity as Secretary, United States Department of Health, Education and Welfare; and SUNG DAI SEU, individually and in his capacity as Pacific Area Manager, Social Security Administration, Department of Health, Education and Welfare,
DEFENDANTS-APPELLANTS

No. 74-3118

FANNIE BUFFINGTON and FRANCES BINER, Individually and on behalf of all others similarly situated, PLAINTIFFS-APPELLEES

vs.

CASPAR WEINBERGER, Individually and in his capacity as Secretary of the Department of Health, Education and Welfare, DEFENDANTS-APPELLANTS

OPINION

[October 1, 1975]

74-1611, Appeal from the United States District Court for the District of Hawaii

74-3118, Appeal from the United States District Court for the Western District of Washington

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Before: BROWNING and TRASK, Circuit Judges, and WILLIAMS,* District Judge

WILLIAMS, District Judge:

These consolidated appeals by the Secretary of the Department of Health, Education and Welfare (hereinafter referred to as the "Secretary") challenge the judgments of two district courts requiring, *inter alia*, the Secretary to provide old-age and disabled social security beneficiaries the opportunity to request a hearing prior to the initiation of recoupment procedures, the purpose of such procedures being the recovery of monies paid to such beneficiaries allegedly in excess of their legal monthly entitlements. In both these class action suits plaintiffs-appellees asserted that the procedures utilized by the Secretary in recouping excess payments denied them due process of law under the fifth amendment because their benefits were reduced or suspended without adequate notice of the reason for the recoupment, without adequate notice of their right to reconsideration, waiver, or partial adjustment of the Secretary's recoupment de-

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* Honorable Spencer Williams, United States District Judge for the Northern District of California, sitting by designation.

cision, and without affording them the opportunity to have a pre-recoupment hearing. *Elliott* v. *Weinberger*, 371 F. Supp. 960, 964 (D. Haw. 1974); *Buffington* v. *Weinberger*, Civil No. 734-73C2 (W.D. Wash., Oct. 22, 1974). The district courts held that mandamus jurisdiction was established under 28 U.S.C. § 1361,[1] and that the recoupment procedures violated the due process rights of these complaining recipients. In addition to providing a hearing to any recipient who requested one, the Secretary was ordered to supply the recipients adequate notice informing them of their right to such a hearing, and the hearing, if requested, had to precede recoupment. While we are in substantial agreement with the general principle that a hearing must be afforded recipients prior to recoupment of their monthly benefits, we do not believe that such a hearing is constitutionally compelled unless the issues raised in a recipient's request for review of the Secretary's initial overpayment and recoupment determination are incapable of resolution upon written submission and/or documentary proof.

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[1] In *Elliott* v. *Weinberger*, plaintiffs asserted that jurisdiction additionally existed under 28 U.S.C. § 1331(a) and 5 U.S.C. § 701 *et seq.* The court in *Elliott*, however, expressly declined to decide whether jurisdiction could be properly predicated upon these sections, but noted in passing that support existed for either jurisdictional base. In *Buffington* v. *Weinberger*, the court found both § 1361 and § 701 *et seq.* to furnish the necessary jurisdictional basis.

The Statutory and Procedural Background

The Social Security Act vests the Secretary with the power to recover lost funds in the event overpayments are made to recipients of old-age or disability benefits. 42 U.S.C. § 404 provides in pertinent part:

> (a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:
>
> > (1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. . . .
>
> (b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

The challenged government procedures are as follows: As of January 1, 1974,[2] all recipients subject to recoupment receive, thirty days before actual recoupment begins, form letters which set forth the reasons for the proposed recoupment, the availability of reconsideration (when a recipient asks for reconsideration, the correctness of the overpayment determination itself is being challenged), the condition for waiver (when a beneficiary requests that his overpayment be waived, he is, in effect, conceding the debt but asking that it be forgiven or reduced), and the need to consult the local Administration office within thirty days if they wish to complain.[3]

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[2] At the time these suits were filed, those beneficiaries whose overpayments were determined from their "annual earnings reports" were not entitled to advance notice of recoupment. Rather, recoupment began immediately, subject to later consideration of the beneficiary's request for reconsideration or waiver. Plaintiffs Silva, Ortez, Vaquilar, Biner and Buffiington all had recoupment procedures initiated against them on the basis of earnings reports filed with the Secretary. Following January 1, 1974 it has been the Secretary's practice to provide all such beneficiaries the same pre-recoupment notice as in other overpayment cases.

[3] Social Security Claims Manual § 5503(a) requires the Secretary to inform overpaid beneficiaries of their "right to request reconsideration" and of the applicable waiver provisions of the Social Security Act. Contrary to the Secretary's contention, the form letter notice does not apprise a beneficiary of his "right" to waiver consideration. Nor does the Claims Manual require such disclosure. Only the "conditions" of waiver need be revealed. Even as to reconsideration, the form letter fails to make clear that such re-appraisal is a matter of right rather than a mere possibility.

The initial overpayment and recoupment notice sent to beneficiaries makes no mention of the forms needed for reconsideration or waiver, nor sets forth information about how to complete them. However, the beneficiary can obtain review of his case by setting forth, in a letter, the reasons why he opposes the overpayment determination or seeks waiver. When reconsideration or waiver consideration is required, the Administration's decision is based upon a claimant's *ex parte* presentation of documentary evidence offered in support of his claim for relief. No oral hearing is given prior to the commencement of recoupment.

Furthermore, it is the Secretary's policy to immediately defer recoupment action upon the filing of a request for reconsideration or waiver. Claims Manual § 5503(b), (c). Any deferral of recoupment beyond thirty days after the date of the initial notice lies completely within the discretion of the Administration. Although appellants claim that it is the Secretary's policy to defer recoupment indefinitely once a request for reconsideration or waiver has been filed (Claims Manual § 5503(c)), in plaintiff Biner's case social security checks were not forthcoming in either November or October of 1973, notwithstanding the fact that Biner filed a waiver request in mid-October 1973. Appellants attribute this oversight to administrative error.

If, after review of the information supplied by the beneficiary, the Secretary adheres to his initial determination that recoupment is appropriate, he notifies the beneficiary to this effect and resumes the withholding of benefits to satisfy the overpayment. If dissatisfied with this decision, the beneficiary may request an administrative hearing *de novo*, in which the beneficiary is provided an opportunity to present oral testimony and to cross-examine witnesses before an independent hearing examiner. 20 C.F.R. § 404.928-.929. However, recoupment is not suspended pending the outcome of this *de novo* hearing. The beneficiary is further entitled to appeal the hearing examiner's determination to the Appeals Council of the Social Security Administration (20 C.F.R. § 404.945), and to judicial review of the Appeals Council's decision pursuant to 42 U.S.C. § 405(g).

The Facts

In *Elliott*, plaintiffs Silva, Ortiz and Vaquilar (subclass one) were determined to have been overpaid by the Secretary based upon their own annual earnings reports. They all received the form letter previously mentioned indicating the reasons for the overpayment determination, the specific amount overpaid and the amount by which the recipient's subsequent benefit checks would be reduced or suspended altogether. These plaintiffs were additionally apprised of the possibility of reconsideration and the conditions of waiver. All of them contacted the Administration's local offices within thirty days of receipt of the letter. At the time the *Elliott* court rendered its decision, the Secretary had completed re-

coupment against two of these plaintiffs, but as to the other had deferred recoupment pending disposition of the suit.

Plaintiffs Elliott, Gaines and Yamasaki (subclass two) received notices more than thirty days before recoupment was to begin, the notice disclosing information similar that contained in the notices sent to subclass one plaintiffs.[4] Plaintiff Elliott was notified that the overpayment determination was predicated upon "her receipt of both retirement and disability benefits when she was entitled to only disability benefits." *Elliott*, *supra* at 965. "Duplicate payments" was the reason given Gaines for his overpayment, and plaintiff Yamasaki was told that "a processing error" caused an overpayment to be sent to her. All subclass two plaintiffs contacted their district office within thirty days after receipt of the overpayment notice. Recoupment against Elliott and Gaines was deferred pending resolution of this case, whereas recoupment against Yamasaki has been completed. *Elliott*, *supra* at 965-66.

As to plaintiffs Buffington and Biner, their claims arose out of factual situations similar to those pertaining to three of the named plaintiffs in *Elliott*.[5]

Both Buffington and Biner are recipients of social security old-age benefits. Based on "annual earnings reports" submitted by plaintiffs, the Secretary determined that they had received overpayments of

[4] For a discussion of the major difference see note 2 *supra*.

[5] See note 2 *supra*.

benefits, and consequently sought to recoup the overpayments from plaintiffs' future benefits.[6]

In 1973 Mrs. Buffington was entitled in her own right to old-age social security benefits of $80.50 per month. Based upon her husband's earnings record, she was also entitled to wife's benefits of $15.70 a month, resulting in total monthly benefits of $96.20 (she actually was receiving $89.90 per month due to monthly Medicare deductions of $6.30). In September 1973, plaintiff's husband filed an annual earnings report which showed that he had received earnings in 1972 which exceeded the statutory limit. Accordingly, the Secretary determined Mrs. Buffington to have been in receipt of a total overpayment of $78.60. Notice of the overpayment was sent to Mrs. Buffington on October 3, 1973, indicating that the overpayment would be withheld from her next benefit check. In early November she received a social security check in the amount of $11.30. Mrs. Buffington subsequently submitted a request for reconsideration to the local administrative office. On July 24, 1974 her request was denied and the original overpayment determination was sustained.

[6] Pursuant to 42 U.S.C. § 403(b), deductions from social security benefits must be made when a beneficiary's earnings exceed the amount prescribed by statute. To determine whether deductions are appropriate in any given case, a beneficiary who earns more than the statutory maximum is required to file an "annual earnings report" which sets forth the amount of wages earned by the beneficiary during the preceding year. The social security application form, and certain pamphlets sent to beneficiaries, advise the claimants of the filing requirement.

Mrs. Biner was found entitled to old-age social security benefits in November 1970. In November 1972, however, she notified her claims representative that she intended to cease working in December 1972.[7] The Social Security Administration in 1972 sent Mrs. Biner three checks in a total amount of $2,216.20, representing benefits for all of 1972.[8] However, the Administration subsequently discovered, as a result of a cross check with Biner's former employer, that Biner had earned income in

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[7] There is considerable dispute as to whether plaintiff Biner also informed the district office that her earnings would not exceed the statutory maximum in 1972. The Secretary contends that plaintiff represented to her claims representative that she would not have earnings above $1,680 for the year 1972, and that based upon this representation the Secretary issued Mrs. Biner $2,216.20 in excess benefit checks. Plaintiff Biner, on the other hand, claims that her purpose in contacting the local office was to ensure that she would begin receiving her benefits promptly after her retirement in December 1972, and, as such, would only have had cause to inform the office of the date of her retirement, not the amount of income she earned during 1972. In any event, she exceeded the earnings maximum in 1972—the year for which she received the benefit checks at issue here.

[8] It is unclear whether Mrs. Biner knew or should have had reason to know that these checks represented benefit payments for the year 1972. The Secretary contends that enclosed with at least the first check was a letter which indicated that the check was intended as back payment for 1972. Excerpts of this letter which are quoted in the affidavit of the Deputy Director of the Bureau of Retirement and Survivors Insurance of the Social Security Administration do not bear this out. *Buffington* Tr. 311. On the other hand, Mrs. Biner asserts that no explanation whatsoever was furnished by the Administration articulating the purpose in its sending this check.

excess of the statutory amount for 1972. Thereupon, the Secretary requested Mrs. Biner to file an annual earnings report, which she submitted on August 28, 1973; and it was upon this basis that the overpayment was determined.

In the latter part of September 1973, Mrs. Biner was notified that she had been overpaid, and consequently, her benefits would be suspended until the entire amount had been recouped. She was also supplied with a facsimile of the form letter referred to earlier. She received no benefit checks for October 1973. In Mid-October 1973 Mrs. Biner received a letter from the Administration containing "waiver" forms which she was instructed to fill out and return to the district office if she wished to do so. Mrs. Biner completed the forms and mailed them to the local office. However, submission of this request for waiver consideration did not halt recoupment proceedings. Moreover, on November 19, 1973 Mrs. Biner was informed that she was at fault in retaining the checks and, consequently, no waiver would be permitted. She was also informed that the original suspension of her benefits had been adjusted so that $50.00 per month would be withheld from her regular benefit payments.

During the latter part of 1973 Mrs. Biner twice requested reconsideration of the Secretary's overpayment decision. Again, recoupment was not halted. On April 8, 1974, however, the Secretary adhered to his initial determination that recoupment was appropriate, and continued to deduct amounts from

Mrs. Biner's subsequent benefit checks. In late May or early June of that year, Mrs. Biner requested and was granted on October 21, 1974 an administrative hearing to review the propriety of the Secretary's recoupment decision. After oral hearings, the administrative law judge sustained the Secretary's decision. Appeal of the judge's ruling is presently pending.

The District Courts Properly Exercised Jurisdiction Under 28 U.S.C. § 1361

The Secretary contends that the district courts erred in assuming jurisdiction over these cases pursuant to the Federal Mandamus statute, 28 U.S.C. § 1361. Mandamus has traditionally been viewed as appropriate to compel officials to comply with the law only when the claim is clear and certain and the duty of the officer is ministerial and "so plainly prescribed as to be free from doubt." *United States* v. *Walker*, 409 F.2d 477, 481 (9th Cir. 1969).

Typically, mandamus has been limited to cases in which statutory or regulatory duties were sought to be enforced. Recently, however, in *Knuckles* v. *Weinberger*, 511 F.2d 1221 (9th Cir. 1975), this court held section 1361 to supply the necessary jurisdictional basis when a constitutional duty is made clear by subsequent judicial interpretation. In *Knuckles* we conclude that a district court had section 1361 jurisdiction to consider constitutional claims asserted against the Department of Health, Education and Welfare's summary suspension of social security payments. In so holding, we made it clear

that it is not essential to a finding of jurisdiction that the constitutional duty sought to be enforced be clear beyond all doubt from the outset of the litigation. See also *Brown* v. *Weinberger*, 382 F. Supp. 1092 (D. Ma. 1974). All that is required is that plaintiffs avoid asserting unsubstantial claims. *Mead* v. *Parker*, 464 F.2d 1108 (9th Cir 1972); Byse & Fiocca, "Section 1361 of the Mandamus and Venue Act of 1962 and 'Non-Statutory' Judicial Review of Federal Administrative Action," 81 Harv. L. Rev. 308 (1967). If we were bound to first determine the existence of a duty on the part of the Secretary as a prerequisite to finding jurisdiction under § 1361—an approach urged upon us by the Secretary—we would, in essence, be disposing of these cases on their merits—an exercise wholly inappropriate in deciding the threshold question of jurisdiction.

In the instant cases, the allegations contained in the complaints present substantial constitutional claims, namely, that *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), compels the conclusion that the precedures instituted by the Secretary deprive plaintiffs of their property without due process of law. While section 404 of the Social Security Act vests the Secretary with discretion in establishing procedures to recover overpayments, he may not institute procedures which violate the fifth amendment. Precedents clearly demonstrate that the applicability of the *Goldberg* rationale to the instant circumstances is not so tenuous as to seriously call into question the substantiality of

plaintiff's claims here. The district courts therefore properly assumed jurisdiction under § 1361 to decide whether the Secretary had abused his discretion.[9] *Accord Frost* v. *Weinberger*, 515 F.2d 57 (2d Cir. 1975); *Mattern* v. *Weinberger*, Civil No. 74-1776 (3d Cir., June 3, 1975) (slip opinion); *Martinez* v. *Richardson*, 472 F.2d 1121 (10th Cir. 1973).

The Class Action

The district court in *Elliott* certified the Silva, Ortiz and Vaquilar plaintiffs as representatives of a subclass of old-age beneficiaries resident in Hawaii subject to actual or possible recoupment of overpayments as a result of their own annual income reports. The Elliott, Gaines and Yamasaki plaintiffs were certified as a subclass representing recipients of old-age and disability benefits resident in Hawaii who were subject to actual or possible recoupment for reasons other than the filing of annual income reports. The court ordered (1) the posting of a notice in every local social security office; (2) the publishing of an advertisement in a non-legal section of two newspapers of general circulation; and (3) the inclusion of a notice of the suit in every letter from the Administrating informing the recipients of its overpayment determination. The notice informed the members of the class of the pendency of the suit, of

[9] Having found an adequate jurisdictional basis under the Mandamus Act, it is unnecessary to decide whether the Administrative Procedure Act or 28 U.S.C. § 1331(a) also furnish an independent source of jurisdiction.

their right to intervene, and of their right to question the adequacy of their representation. *Elliott* Tr. 199-201. The Government takes no issue with the *Elliott* court's class certification order or with the adequacy of the notice provided.

The *Buffington* court certified the two named plaintiffs as representatives of a nation-wide class of persons eligible for social security old-age and survivors' benefits under 42 U.S.C. § 402 "whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing." The court excepted from the class residents of Hawaii and the Eastern District of Pennsylvania and those individuals involved in other litigation challenging the Secretary's procedures in recouping benefits without prior notice and hearing. *Buffington* Tr. 422-24. No notice whatsoever was provided members of the certified class.

The Secretary contends that the failure to order that notice be provided to the class was a violation of due process and that the class order must be declared invalid, reducing the effect of the judgment solely to the two individuals named as plaintiffs. The Secretary further argues that the district court abused its discretion in certifying a nation-wide class. We disagree.

There is little doubt that the district court's certification order satisfied the terms of Fed. Rule of Civ. Pro., Rule 23(c)(1) and (3). Furthermore, contrary to the Secretary's suggestion, this action is plainly of the type described in Rule 23(b)(2), not

23 (b)(3). Although plaintiffs seek recovery of monies recouped from their monthly benefit checks, their primary purpose in bringing this action is to enjoin the Secretary from recouping such sums without providing social security beneficiaries a proceeding hearing. It is only logical that as a necessary part of their claim plaintiffs would seek to recover money which they believed to have been retrieved pursuant to the procedures sought to be enjoined. In short, pecuniary recovery is purely incidental to this suit's principal purpose, and consequently this action is properly certifiable under 23 (b)(2). *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971). In similar cases, too numerous to cite here, class certification of an essentially (b)(2) action was not precluded simply because monetary benefits were an inevitable by-product of the recovery of the injunctive and declaratory relief prayed for. See cases cited in 3B Moore's Federal Practice, ¶ 23.40, at 23-652 to 23-654 (1974), and 1974 Cum. Supp. at 82 n.19. In any event, the *Buffington* court's judgment did not award plaintiffs damages.

Under Rule 23(c)(2) notice is mandatory in a (b)(3) class action. And the Supreme Court has so held. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). The Secretary contends that the *Eisen* rationale should be extended to cover all class actions, including, naturally, (b)(2) actions. However, even the *Eisen* Court acknowledged that the notice requirements of subdivision (c)(2) are inapplicable to (b)(2) class actions. *Id.* at 177 n.14. Rather,

Rule 23(d)(2) operates to make notice discretionary with the court in (b)(2) actions.

The weight of authority supports an interpretation—consistent with due process requirements—of Rule 23 which does not require notice in every (b)(2) class action. Compare *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); *Woodward* v. *Rogers*, 344 F. Supp. 974, 980 n.10 (D.D.C. 1972), *aff'd*, 486 F.2d 1317 (D.C. Cir. 1973); *Yaffe* v. *Powers*, 454 F.2d 1362, 1366 (1st Cir. 1971); *Souza* v. *Scalone*, 64 F.R.D. 654, 659 (N.D. Cal. 1974); *Johnson* v. *City of Baton Rouge, La.*, 50 F.R.D. 295, 299 (E.D. La. 1970); *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619 (D. Kan. 1968); 3B Moore's Fed. Prac. ¶ 23.55, at 23-1152; 7A Wright & Miller, Fed. Prac. & Proc., Civil § 1786 (1973) [notice not required in (b)(2) action] with *Schrader* v. *Selective Service Sys. Loc. Bd. No. 76*, 470 F.2d 73, 75 (7th Cir. 1972), *cert. denied*, 409 U.S. 1085 (1972); *Zielstra* v. *Tarr*, 466 F.2d 111 (6th Cir. 1970) [notice required].

The seminal case upon which most, if not all, courts requiring notice rely is the Second Circuit's decision in *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 564-65 (2d Cir. 1968), in which the court by way of dicta stated that "notice is required as a matter of due process in all representative actions." *Id.* at 564. However, in *Frost* v. *Weinberger*, 515 F.2d 57, 65 (2d Cir. 1975), the Second Circuit rejected its earlier pronouncement in *Eisen* and specifically rule that *Eisen's* statements with respect to

notice only applied to class actions brought under provisions of Rule 23 other than (b)(2). Indeed, even before *Frost* some district courts in the Second Circuit resisted *Eisen's* inflexible due process approach to (b)(2) actions, and instead read *Eisen* to say that notice was required in class actions when due process so required. *Lynch* v. *Household Fin. Corp.*, 360 F. Supp. 720, 722 n.3 (D. Conn. 1973).[10]

[10] Likewise, district courts in the Sixth Circuit have not uniformly chosen to follow the decision in *Zielstra* v. *Tarr, supra*; one court finding *Zielstra's* statement that due process required notice in all class actions purely dictum, "since the Court of Appeals held that the District Court did not have subject matter jurisdiction of the case which was on appeal." *Watson* v. *Branch County Bank*, 380 F. Supp. 945, 960 n.11 (W.D. Mich. 1974). *Cf. Alexander* v. *AVCO Corp.*, 380 F. Supp. 1282, 1286 (M.D. Tenn. 1974).

It is unclear where the Fifth Circuit stands on the notice question. In *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969), without discussing due process requirements, the court implied that notice in (b)(2) actions is not required. In Justice Godbold's specially concurring opinion he states that 23(b)(2) "does not require notice." *Id.* at 1127 n.1. Acting in apparent harmony with *Johnson*, the Fifth Circuit affirmed a Florida district court decision which held notice to be inappropriate in (b)(2) class actions. *Mungin* v. *Florida East Coast Ry. Co.*, 318 F. Supp. 720, 732 (M.D. Fla. 1970), *aff'd*, 441 F.2d 728 (5th Cir. 1971), *cert. denied*, 404 U.S. 987 (1971). On the other hand, the Fifth Circuit upheld a district court decision in which *Eisen* was followed and notice was found necessary in a (b)(2) action. *Pasquier* v. *Tarr*, 318 F. Supp. 1350, 1353-54 (E.D. La. 1970), *aff'd*, 444 F.2d 116 (5th Cir. 1971). Perhaps it is fair to infer that at least the Fifth Circuit does not ascribe to the procrustean view that notice is required in all representative actions, rather whether *vel non* notice is mandated depends on the circumstances involved and the applicability of relevant due process considerations.

Contrary to the Secretary's suggestion that the distinction between (b)(2) actions having monetary repercussions and (b)(3) actions is one solely of form of relief sought and not one of substance, relevant authorities have oft stated that the need for notice in a (b)(2) class action is *de minimis* simply because of its fundamental differences from a (b)(3) suit. As the Advisory Committee in its Note accompanying the proposed revised, now adopted, Rule 23 implies, the strict (c)(2) notice requirement is inapposite to a (b)(2) class because (b)(2) classes will tend to be more cohesive and unified so that adequate representation reduces the need for notice. See 39 F.R.D. 106.

> In representative actions brought under the other provisions of Rule 23(b) [provisions other than 23(b)(3)], the class generally will be more cohesive—for example, in many instances each member will be affected as a practical matter by a judgment obtained by another member if individual actions were instituted. Similarly, it is less likely that there will be special defenses or issues relating to individual members of a Rule 23(b)(1) or Rule 23(b)(2) class, than in the case of a Rule 23(b)(3) class. This means that there is less reason to be concerned about each member of the class having an opportunity to be present. 7A Wright & Miller, *supra*, § 1786, at 143.

To the extent that absent class members might, as a matter of policy disfavor the position taken by named plaintiffs, defendants are usually more than adequate

stand-in for the purpose of presenting the policy arguments to the court.

> Thus, in suits under subdivisions (b)(1) or (b)(2), once the court determines that the members are adequately represented as required by Rule 23(a)(4), it is reasonably certain that the named representatives will protect the absent members and give them the functional equivalent of a day in court.
>
> In keeping with this philosophy, class members in Rule 23(b)(1) and Rule 23(b)(2) actions are not provided an opportunity by the rule to exclude themselves from the action as is true in Rule 23(b)(3) actions. [*Air Line Stew.* v. *American Airlines, Inc.*, 490 F.2d 636, 642 (7th Cir. 1973); *Johnson City* v. *City of Baton Rouge, supra; Van Gemert* v. *Boeing Co.*, 259 F. Supp. 125, 130 (S.D.N.Y. 1966)]. Because they do not have the alternative of bringing a separate suit, notice really serves only to allow those members the opportunity to decide if they want to intervene or to monitor the representation of their rights. [*Souza* v. *Scalone, supra*, 64 F.R.D. at 659; *Watson* v. *Branch County Bank, supra*, 380 F. Supp. at 959].

We are of the opinion that the better reasoned view counsels against requiring, under due process principles, notice in every (b)(2) action. Only when the purposes in providing class members an opportunity to signify whether representation by named plaintiffs is fair and adequate or to intervene to present additional claims or to otherwise come into the

action to, for example, submit views as amici curiae, are in need of being served, does due process require the direction of some sort of notice to absent members of a (b)(2) class. In the instant case no such special circumstances exist to impel us to overturn the *Buffington* court's decision not to provide notice.

There is no question but that plaintiffs here are represented by skilled and experienced counsel. Their record here and at the district court level is testimony to this commendation. When, as here, absent members' interests are adequately assured of being represented because there are no money damages involved, no significant factual dispute is in need of resolution, the only issues raised are constitutional, and there is no serious question as to the competency of counsel, notice to the class serves no apparent purposes. *Lynch* v. *Household Fin. Corp., supra; Woodward* v. *Rogers, supra.* The presentation of additional individual claims would have complicated the suit and protracted it to the detriment of the class as a whole. The named plaintiffs' claims are typical of the class, and additional plaintiffs are unnecessary. The constitutional issues involved in the suit have been exhaustively briefed by counsel and fully canvassed in the cases and commentaries, thus rendering additional supplementation by absent members as amici curiae superfluous. *Watson* v. *Branch County Bank, supra.* For all intents and purposes, the class members of

the instant class have received their functional equivalent to a day in court.[11]

The Secretary's claim that the *Buffington* court abused its discretion in certifying a nation-wide class is similarly unpersuasive. In reviewing the designation of a class by the trial judge the appellate court should allow the broadest discretion. *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969). Furthermore, nothing in Rule 23 indicates that a class should not be designated because it is too large. Certification of a national class action is not unknown in the federal courts. *See Woodward* v. *Rogers, supra.* The Secretary does not cite, nor can we find, any authority which supports his rather novel theory limiting (b)(2) class actions because of their numerosity and manageability problems. By its terms, Rule 23 makes manageability an issue important only in determining the propriety of certifying an action as a (b)(3), not a

[11] That Buffington's class determination forecloses absent members from bringing individual suits thereafter, in and of itself, is not a factor militating against certification of a (b)(2) class action. If it were otherwise, no class actions could ever be certified under (b)(2). This is so because in (b)(2) actions absent members, regardless whether they receive notice or not, cannot excuse themselves from the litigation or avoid the res judicata effects of the judgment entered therein. *Compare Air Line Stew.* v. *American Airlines, Inc., supra,* 490 F.2d at 642, with *Schrader* v. *Selective Service Sys. Loc. Bd. No. 76, supra,* 470 F.2d at 75. Indeed, (b)(2) actions are generally preferred for their wider res judicata effects. *Bing* v. *Roadway Express, Inc.*, 485 F. 2d 441, 447 (5th Cir. 1973).

(b)(2), class action. And as a practical matter, since plaintiffs seek no damages, and because notice is not required to be directed to these class members, there simply are no manageability problems here involved.

In short, the *Buffington* suit strikes us as the classic type of action envisioned by the drafters of Rule 23 to be brought under subdivision (b)(2). The Secretary has acted on grounds generally applicable to all members of the class and final injunctive and declaratory relief with respect to the whole class is appropriate. Even if we required the *Buffington* suit to proceed on behalf of the named plaintiffs only, the injunctive relief awarded in this suit would necessarily operate in favor of all social security old-age and survivor benefit recipients. It would be a practical absurdity were the Secretary to provide the due process safeguards enunciated herein to the exclusion of all save the named plaintiffs. The Administration would be besieged with suits seeking the vindication of each and every social security recipient of old-age and survivors' benefits subject to the Secretary's recoupment procedures. With a copy of this decision in their hands, ever-watchful legal-assistance attorneys would wreak havoc on the administration of the Secretary's recoupment programs. Multiplicity of actions based on the same constitutional claims advanced here would be the inevitable result. Obviating such unnecessary duplication is the very purpose for which Rule 23(b)(2) was designed. Maintenance of the instant case as a class action is not only proper,

but it also will effectuate the interests both of judicial administration and of justice.

The Merits

The principal case upon which plaintiffs rely is *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). There the Supreme Court held that a pre-termination evidentiary hearing was required before a welfare recipient's benefits could be terminated. Stressing the recipient's "brutal need" in continued payments, the Court found that in the balance

> the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. *Goldberg, id.* at 266.

Plaintiffs contend that the *Goldberg* decision compels a finding that pre-recoupment hearings are constitutionally necessary when the Secretary determines that overpayments have been made to social security old-age and disability beneficiaries and seeks to recoup those overpayments.

On the other hand, the Secretary argues that, for the following reasons, *Goldberg* should be read narrowly, and thus determined inapposite to the cases here: (1) the Secretary's present "written hearing" is adequate to establish the "probable validity" of the Administration's overpayment determination; (2) the impact upon a social security recipient of a

reduction in or suspension of his or her monthly payments is not severe enough to warrant providing the recipient an oral hearing prior to recoupment; (3) to require such a hearing would result in vast disruption of the Social Security System; (4) in waiver consideration cases no property interest is involved invoking due process safeguards; and (5) no factual issues are presented in reconsideration cases necessitating oral pre-recoupment hearings.[12]

In *Mattern* v. *Weinberger*, Civil No. 74-1776 (3d Cir. June 3, 1975) (slip opinion), all the arguments

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[12] In a footnote, the Secretary postulates that since the plaintiffs in *Elliott* whose overpayments were determined by information other than that disclosed in annual earnings reports have as yet had their reconsideration and/or waiver claims acted upon by the Secretary (due to the district court's order prohibiting the Secretary from so acting), "the court's failure to await the Secretary's action on those written requests was plain error." Appellants' Brief in *Elliott*, at 17 n.19. In other words, the Secretary contends that the district court failed to observe the requirement that administrative remedies must be exhausted as a requisite to the initiation of proceedings in a federal court.

However, the case here is to be distinguished from the normal situation in which federal jurisdiction is sought to be invoked to review administrative action. Most often, the courts are asked to scrutinize the merit of an administrative determination, and in that instance, the available avenues of administrative review must ordinarily be exhausted. On the other hand, where, as here, the procedures which the agency contends must be exhausted are themselves the subject of attack, exhaustion is unnecessary. *Finnerty* v. *Cowen*, 508 F.2d 979 (2d Cir. 1974); *Martinez* v. *Richardson, supra*, 472 F.2d 1121; *Marsh* v. *County School Bd.*, 305 F.2d 94 (4th Cir. 1962); *Francois* v. *Bushell*, 325 F. Supp. 531 (N.D. Cal. 1971).

advanced here by the Secretary to distinguish the cases at bar from *Goldberg*, as well as the arguments propounded here by the Secretary, in connection with the burden that requiring pre-recoupment oral hearings would impose on the Administration, were fully considered and for the most part rejected. This Court concurs with the Third Circuit's opinion and shares in its conclusion that *Goldberg* requires the Secretary to provide social security beneficiaries with a pre-recoupment oral evidentiary hearing along the parameters and with the qualifications outlined in the *Mattern* decision.

It cannot be seriously maintained that some form of process is not due social security beneficiaries whose old-age or disability payments are subject to suspension or reduction under the Secretary's recoupment procedures. Plaintiffs' interests in their monthly benefits amounts to a statutory entitlement and, therefore, constitutes a property interest protected under the Due Process Clause of the fifth amendment. *Goss* v. *Lopez*, 419 U.S. 565, 573 (1975); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972); 42 U.S.C. § 401 et seq. Thus, they may be deprived of their property interests only by due process of law. *Id.* That the deprivation of such property interests does not subject the persons entitled thereto to a "severe detriment or grievous loss" is of no moment in determining whether due process comes into play.

> [F]or in determining 'whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake.' [citations omitted.] [T]he length and consequent severity, while another factor to weigh in determining the appropriate form of hearing, 'is not decisive of the basic right' to a hearing of some kind. [citation omitted.] The Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. [citations omitted.] *Roth* at 576 (emphasis original.)

A suspension or reduction in old-age or disability benefits imposed in order to recover an alleged overpayment is not a *de minimis* deprivation outside the protection of the due process clause. *See Goss, id.* (wherein the Court found a 10-day suspension from school not to be *de minimis*).

The Secretary contends that where a recipient admits that an overpayment has been made but seek to gain a waiver of recoupment under 42 U.S.C. § 404(b), the recipient has no property interest in the amounts overpaid deserving of due process protection. This argument is untenable. In *Board of Regents* v. *Roth*, *supra* at 577, the Supreme Court observed that,

> the welfare recipients in *Goldberg* v. *Kelly*, *supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they

had a right to a hearing at which they might attempt to do so.

Thus, the social security beneficiaries here who concede they have been overpaid nonetheless possess a property interest in their right to demonstrate they are eligible for waiver under the terms of 42 U.S.C. § 404(b). Section 404(b) provides a recipient of an overpayment with a statutory right not to have his payments reduced or suspended if he is "without fault" and the recovery would "defeat the purpose" of the Act or "would be against equity and good conscience." It is not a matter of "governmental beneficence," as the Secretary puts it, in his waiving recoupment. Rather, it is a question of complying with the statute. Indeed, under section 404(b) waiver is not discretionary, but mandatory, viz., it provides that "there *shall* be no" recoupment under the conditions specified. "Thus, the fact that [plaintiffs] may not have been entitled to *receive* the overpayment[s] does not mean that [they have] no claim of entitlement to *retain* [them] (or at least to receive the full amount of [their] future monthly payments)." *Mattern* v. *Weinberger*, *supra* at 26. (emphasis original.)

More difficult, however, is determining the form of process to which plaintiffs are due. The Secretary contends that, except in the "most extraordinary" circumstances as epitomized by *Goldberg* v. *Kelly*, the Supreme Court has not required trial-type hearings prior to a deprivation of a property interest where, as here, the preliminary pre-deprivation procedures

are sufficient to establish the "probable validity" of the administrative claim.

In *Mattern*, the Third Circuit voiced what we believe to be the crucial flaws in the Secretary's analysis.

> First, the Secretary relies primarily on a line of cases which, while having some relevance on the issue, did not purport to overrule or modify *Goldberg* and are not controlling here. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). Of these three decisions, only *Mitchell* indicated that 'probable validity' may be determined in the absence of a prior oral hearing; *Fuentes* and *Sniadach*, in fact, required prior oral hearings. Thus, *Mitchell*, rather than *Goldberg*, represent the exception to the rule. . . . In *Goldberg*, the Supreme Court considered a state welfare procedure in which a claimant had a right, after being interviewed by his caseworker and prior to termination of benefits, to receive a written explanation of the reasons for termination and to submit written information in rebuttal. He also had a right to a full oral hearing *after* termination. 397 U.S. at 258-60. The Court, however, held that this procedure was insufficient and required an oral hearing prior to termination. Since the procedure invalidated in *Goldberg* would seem to be at least effective in ensuring 'probable validity' as the procedure used here, and since the Court in *Mitchell* did not purport to modify *Goldberg*, we refuse to extend the reasoning of *Mitchell* outside the creditor/debtor

context and to permit *ex parte* determination of 'probable validity' in social welfare cases.

Furthermore, even if *Mitchell's* 'probable validity' analysis were applicable to social welfare cases, the procedure here may not pass muster. . . . The Court upheld the Louisiana sequestration statute challenged in *Mitchell* partly because it provided for an immediate hearing after the writ issued. *Id.* at 618. Thus, the constitutionality of a procedure establishing 'probable validity' without a full oral hearing prior to the property deprivation may depend in part on whether there is an immediate right to an oral hearing afterward. *Mattern, supra* at 14-16. (emphasis original.)

As evidenced in the case of plaintiff Biner, however, attending review of the Administration's initial overpayment determination exists a delay of several months between the time recoupment commences and the time a recipient is provided a hearing.

> Finally, if the Secretary's pre-recoupment procedures are to be upheld on the ground that they are sufficient to determine 'probable validity,' they would have to be effective in minimizing the risk of an erroneous determination. *See Mitchell, supra* at 618; *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), at 170 (Powell, J., concurring) and 188 (White, J., concurring in part and dissenting in part.) However, the Secretary's own figures undercut his contention that the procedures at issue here are effective to minimize erroneous decisions to recoup. In 1970, the only year from which figures have been made avail-

> able to us [as is also the case here], over one-third of all persons seeking a post-recoupment hearing (560 out of 1600) obtained reversals.
>
> Therefore, because of a combination of factors —the fact that the Supreme Court has given no indication that *Mitchell's ex parte* 'probable validity' approach is applicable outside the creditor/debtor context, and that such an approach appears to have been at least implicitly rejected in *Goldberg* v. *Kelly*; the substantial delay between the initiation of recoupment and an oral hearing; and the significant reversal rate following post-recoupment hearings—we conclude that the pre-recoupment procedures cannot be defended on the ground that they are sufficient to establish the 'probable validity' of the determination in question. *Mattern, id.* at 16-17.

The Secretary also contends that oral hearings are not compelled here because unlike the welfare recipients in *Goldberg* whose benefits were terminated, social scurity beneficiaries whose monthly payments are suspended or reduced through recoupment procedures are not thereby necessarily left destitute. In the Secretary's view, the severity of the impact visited upon plaintiffs here is not of the same quantum as that involved in *Goldberg*, and therefore, the oral hearing required in *Goldberg* is here unnecessary. However, the line of precedent following the *Goldberg* decision does not support the Secretary's position.

It is axiomatic that the requisites of due process vary according to specific factual contexts. *Goldberg*,

supra at 262-63. And it is true that of significant importance in determining the formality and procedural requisites of the process due in particular circumstances is the relative weight of the property interest involved. *Board of Regents* v. *Roth*, *supra* at 570; *Crow* v. *California Dept. of Human Resources Develop.*, 490 F.2d 580 (9th Cir. 1973), *vacated* 95 S.Ct. 1110. That is not to say, however, that the relative weight of the interest involved is dispositive of the question whether an oral hearing is to be afforded in the first place. In its most recent pronouncements concerning the subject, it has become quite clear that the Supreme Court envisions due process to generally require a pre-deprivation hearing of some type as long as the interest at stake is not *de minimis*, irrespective of the severity of the impact resulting from that deprivation. *Goss* v. *Lopez*, *supra*; *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 606 (1975); *Fuentes* v. *Shevin*, *supra* at 88-89; *Bell* v. *Burson*, 402 U.S. 535 (1971).[13]

The government does not contend, nor can it be said, that the interest of these plaintiffs in receiving their monthly social security benefits is *de minimis*. As a threshold determination, therefore, it is our opinion that, excluding for the moment consideration of any competing interests on the part of the government, a hearing of some sort should be afforded plaintiffs prior to the recoupment of their social security old-age and disability benefits. Of similar resolve were the courts in *Mattern* v. *Weinberger*, *supra*; *Eldridge* v. *Weinberger*, 493 F.2d 1230 (4th Cir. 1974), *aff'g* 361 F. Supp. 520 (W.D. Va. 1973), *cert. granted*, 43 U.S.L.W. 3383 (January 14, 1975); *Williams* v. *Weinberger*, 494 F.2d 1191 (5th Cir. 1974), *aff'g* 360 F. Supp. 1349 (N.D. Ga. 1973).

[13] We share the Third Circuit's view that Judge Friendly's contrary holding in *Frost* v. *Weinberger*, 515 F.2d 57 (2d Cir. 1975), is distinguishable and should not be followed.

As previously noted, due process is a flexible concept, and fashioning the specific parameters of the hearing required thereunder depends on striking an appropriate accommodation of the competing interests involved. *Goss*, *supra* at 579. The Secretary suggests that affirmance of the district courts' holdings that due process requires a full *Goldberg* type hearing prior to recoupment of overpayments made to social security beneficiaries would impose a heavy fiscal burden on the Department of HEW. Since the Department already provides overpaid recipients elaborate post-recoupment procedures, including the opportunity for a *de novo* hearing, it appears that any burden in having to establish a new system, wherein the opportunity for a hearing must be provided before rather than after recoupment, will be minimal. The major fiscal difficulty envisioned by the Secretary is the likelihood that the availability of pre-recoupment hearings will result in the filing of a far greater number of requests for reconsideration or waiver.

During oral argument counsel for the Secretary cited statistics that show that the number of hearings on termination of welfare benefits has increased from 19,000 per year to 68,000 per year since the

decision of the Supreme Court in *Goldberg*. Without further clarification, these statistics are of little value. They do not disclose what change, if any, has taken place in the success rate of welfare beneficiaries who receive a hearing. If the effect of *Goldberg* were to cause the filing of a large number of frivolous requests for hearings by people seeking to delay termination, there might be reason to question the wisdom of *Goldberg*. But if, in fact, the percentage of successful contests has remained constant or declined slightly, then *Goldberg* has resulted in a larger number of correct determinations of the issue of whether welfare benefits should be terminated, and, as such, *Goldberg* has benefited rather than burdened the system.

If requiring pre-recoupment hearings would result in the filing of frivolous requests in order to delay recoupment, the present procedure should also encourage frivolous written requests for reconsideration or waiver. This is so because the present practice of the Secretary is to delay recoupment until after a determination by the Department that the request should not be granted. But the statistics provided by the Secretary show a high rate of success among those requesting either reconsideration or waiver. "Of those who do contest the initial overpayment determination, about sixty-nine per cent succeed in getting the Administration to reverse itself." *Elliott* v. *Weinberger*, 371 F. Supp. at 967. One may reasonably wonder what happened to the frivolous, delay-motivated requests for reconsideration or waiver?

As evidenced by plaintiff Biner's case, the present procedure involves a substantial delay anywhere from four to five months between the time a recipient requests an administrative *de novo* hearing upon his or her claim for waiver or reconsideration and the time the hearing is held and the matter is disposed of. Thus, a decision that hearings must be held prior to recoupment would mean that the government could not collect payments for several months after the initial determination that recoupment was necessary. However, the present system has the evil of denying benefits for an equally long time from beneficiaries who are successful, after a full hearing, in reversing the Secretary's initial determination. Which system is preferable should depend upon the success rate of recipients who take their case to the hearing stage. Relevant statistics indicate this rate to be very high —more than one third of those recipients who avail themselves of the opportunity to have their grievances resolved at the *de novo* hearing succeed in persuading the Administration to reverse its original recoupment decision. *Elliott, supra* at 967. Since the success rate is significantly high, the government is being allowed to temporarily recoup payments when it has no claim to them. *See Fusari* v. *Steinberg*, 95 S.Ct. 533 (1975), in which the Supreme Court found "significant" in determining the requisites of due process a 19.4 to 26.1 per cent reversal rate of appealed denials of unemployment compensation benefits. A system which delayed the start of recoupment

pending the outcome of a hearing, the purpose of which is to determine the propriety of that recoupment, would provide a net benefit to society.[14]

As alluded to earlier, the Secretary draws a distinction between reconsideration cases and waiver consideration cases, contending that they raise somewhat different legal issues. Under the present procedures, when a recipient asks that the Secretary's overpayment determination be reconsidered, he is challenging the correctness of the overpayment determination itself. Contrariwise, when a social security beneficiary asks that recoupment be waived, he, in essence, is conceding that he was overpaid, but asks that recovery of the excess benefits involved be foregone.

The Secretary contends that in the vast majority of recoupment cases issues are presented which are

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[14] In *Fusari* v. *Steinberg, supra,* the Court discussed the manner in which the delay in payment of unemployment insurance benefits pending a hearing affected the balancing required to determine the requirements of due process.

> In this context, the possible length of wrongful deprivation of unemployment benefits [between 100 and 126 days] is an important factor in assessing the impact of official action on the private interests. [citations omitted.] Prompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations. Thus, the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process. 95 S.Ct. at 540.

Fusari appears to require that the existence of a substantial delay between the initial administrative determination and the conclusion of a full hearing be weighed as a factor tilting the scales toward providing a pre-recoupment hearing.

uniquely suited to resolution by written submissions and documentary proof, thus obviating the need to provide full-blown, *Goldberg* type hearings. Although we agree that in those cases where factual disputes are as well suited to disposition by documentary proof and written submissions as by oral hearings, due process does not require a pre-recoupment oral hearing, we cannot divine, as does the Secretary, that in virtually all reconsideration and waiver cases the only issues raised are those adaptable to such facile resolution. The Third Circuit's analysis of those cases arising in the recoupment context in which such documentary disposition is permissible under due process principles is extremely well reasoned and warrants quotation here.

> Implicit in *Goldberg* v. *Kelly* is the recognition of the fact that issues likely to arise in welfare termination cases can only be resolved through an oral hearing. One of the plaintiffs was a woman whose benefits had been terminated because she allegedly failed to cooperate with welfare officials in suing her estranged husband. Another was a man whose benefits were terminated because he refused to accept drug counseling and rehabilitation, though he claimed that he did not in fact use drugs. *Goldberg, supra* at 256 n.2. It is obvious that resolution of those factual disputes could only be made at an oral hearing, where the trier of fact could evaluate the credibility of the claimant. As the Court noted, "where credibility and veracity are at issue, as they must in many

termination proceedings, written submissions are a wholly unsatisfactory basis for decision." *Id.* at 269.

Similarly, in *Goss* v. *Lopez*, *supra*, the question of whether a student had engaged in disruptive conduct justifying suspension could not possibly be determined without an oral hearing. See also *Bell* v. *Burson*, *supra*, which required an oral hearing to determine fault before revocation of a driver's license. By contrast, the Supreme Court in *Mitchell* held that no prior opportunity whatsoever need be given the debtor to oppose repossession of his property, in part because "the issue turns on the existence of the debt, the lien, and the delinquency," which "are ordinarily uncomplicated matters that lend themselves to documentary proof." *Id.* at 609. Thus, "[t]he nature of the issues at stake minimize the risk" of an erroneous *ex parte* determination. *Id.* at 609-10 *Mattern*, *supra* at 23-24.

* * * *

We agree with the Secretary that "reconsideration" cases are generally well suited to resolution by documentary proof, and that claimants in most cases of this type are not constitutionally entitled to a prior oral hearing.[28]

28. We decline to establish a flat rule that *all* "reconsideration" cases may be decided prior to recoupment without oral hearing, since we do not have sufficient basis for knowing all the types of cases which the Secretary may classify as being of the "reconsideration" type. The crucial distinction is not whether the cases are labeled

"reconsideration" or "waiver," but whether they lend themselves to resolution by documentary proof. Thus, while we shall use those terms as suggested by the Secretary for purposes of convenience, we do not mean to imply that the constitutionality of recoupment in a particular case is dependent upon the label used nor that we necessarily accept the Secretary's categorization *in toto*.

[As exemplified by the cases at bar] most of these disputes involve matters of a purely arithmetical nature—whether the computation of an earnings statement is correct; whether a computer's calculation of the amount of benefits received is accurate; whether two benefit checks have been received rather than one. In such circumstances, an examination of social security records and cancelled checks would seem to be sufficient, and it is hard to see how an oral hearing would be of much benefit to the claimant. Consequently, the Secretary's pre-recoupment procedures permitting written evidence and providing for an examination of written documents, when coupled with a right to a *post*-recoupment oral hearing, satisfy due process.

We had one *caveat*, however. Because we cannot envision all the situations in which "reconsideration" cases are likely to arise, we acknowledge the possibility that there may be cases where the opportunity to appear in person might be important in making an accurate determination. Thus, while many "reconsideration" cases can be decided without a prior oral hearing, we believe that, as a matter of due process, the

Secretary should establish procedures which would provide for an oral hearing where a case does not hinge on documentary evidence and where a claimant raises issues which necessitate an evaluation of his credibility. We are mindful of the concern expressed in *Goldberg* that many claimants lack the education or ability to frame written submissions in a persuasive light, and thus if a claimant in a "reconsideration" case *raises* such an issue, he should be entitled to a hearing.

If, however, a claimant merely denies receiving duplicate checks or claims that his earnings were of a certain amount, cancelled checks bearing his endorsement or earnings records maintained by the social security office would seem to constitute hard proof incapable of oral rebuttal. *Mattern, supra* at 24-25.

If plaintiff Biner had simply denied receiving the checks here in dispute or had claimed that they did not represent an overpayment, she would not have been constitutionally entitled to a hearing prior to recoupment. Cancelled checks bearing her endorsement would have been persuasive proof that she had received and negotiated them, and a comparison of the salary listed in her earnings report with the statutory maximum—showing the former to exceed the latter—would be strong evidence that the checks represented an overpayment. "Furthermore, [plaintiff Biner] came forth with no written evidence to support a contention that she had not in fact been paid [$2,216.20] or that the check[s] did not represent an overpayment." *Id.* at 25-26. In her two requests for reconsideration, she simply stated that "I do not believe there was any overpayment." *Buffington* Tr. 112, 113.

> Consequently, if she had made solely those contentions, it is hard to see how a pre-recoupment oral hearing would be helpful. In all cases, however, a claimant should be informed, prior to initiation of recoupment, of the basis on which an adverse determination is made and should be offered the opportunity to explain or rebut any written evidence against her.[15]
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> * * * *
>
> The Secretary also contends that "waiver" cases, like "reconsideration" cases, lend themselves to resolution by documentary proof. We disagree. One of the factors to be considered in a "waiver" case is whether the claimant is "without fault," and the Supreme Court has clearly indicated that determinations as to fault must be made at an oral hearing. *Mattern, supra* at 26-27.

As in *Mattern*, the "facts of [plaintiff Biner's case] graphically illustrate the need for an oral hearing." *Id.* While conceding that it may have been at fault in issuing Mrs. Biner the checks which represented

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[15] Like the district court in *Elliott* we have serious doubts as to the adequacy of the Secretary's summary explanation of some of its overpayment determinations as the result of "processing error." *Elliott* Tr. 285. The strictures of due process would seem to compel a more elaborate description of the type of error which gave rise to the Secretary's determination in the first instance.

overpayments for the year of 1972, the Administration nonetheless believed that the letter enclosed with the first check sent to Biner and the fact that she received checks while she was employed put her on notice that continued retention of those checks was improper and precluded a finding on its part that she was "without fault" within the meaning of the Social Security Act. *Buffington* Tr. 212-13. However, whether Biner knew that she was not entitled to these checks seems to be a matter difficult to resolve without hearing her side of the story. "Similarly, a finding of fault could not rest on the ambiguous [letter included with the first overpayment check sent to Biner] at least without giving [her] an opportunity to explain in person what she thought it meant." *Id.* at 27.

> Another requirement that a claimant in waiver case must meet is that recoupment would either frustrate the purposes of the Act or be against equity and good conscience. As defined by the Secretary's regulations, these terms refer to such matters as difficulty in meeting necessary living expenses or a change of position by the recipient. [20 C.F.R. §§ 404.508, 404.509] We do not see how a resolution of such questions can reliably be determined in the absence of oral testimony.
>
> While we believe that claimants in "waiver" cases have a constitutional right to a pre-recoupment oral hearing, that right may not attach in all cases. Where a claimant in a "waiver" case raises no disputed issue of fact,

> or where, accepting his version of the facts as true, we could say as a matter of law that he was not entitled to retain the overpayment, then again it is hard to see how a pre-recoupment hearing would be of benefit. Thus, the constitutional requirement of a hearing may be limited to some extent by principles analogous to summary judgment in civil litigation. *See Mills* v. *Richardson*, 464 F.2d 995 1001 (2d Cir. 1972). *Id.* at 27-28.
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> * * * *
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> In sum, we conclude that the recoupment procedure established by the Secretary is constitutionally deficient in that it does not provide for pre-recoupment oral hearings in the situations we have indicated are necessary. We do not believe that due process requires pre-recoupment oral hearings in all cases, but the Secretary's existing procedure makes no distinction between the various types of cases and issues that are likely to arise. To the extent that a hearing is required, we agree with the district court[s] that the full panoply of procedural safeguards need not be provided and that the pre-recoupment hearing need not take the form of a judicial or quasi-judicial trial. *Id.* at 28-29.

We are therefore of the opinion that to the extent indicated below the specific requirements outlined in the lower court's opinions are those which are compelled by the Due Process Clause of the fifth amendment. Specifically, the Secretary is required to provide a pre-recoupment hearing in the situations noted previously which affords the complainant the following rights:

1. to present his case orally and to submit evidence with witnesses or documents;

2. to cross-examine witnesses against him;

3. to be represented by counsel if he wishes or to retain the informal assistance of a friend;

4. to have an independent hearing officer preside during the hearing who is totally uninvolved with the initial overpayment and recoupment decisions;

5. to receive an opinion written by the hearing officer which sets forth his decision and the reasons and evidence in support of it;

6. to review his file five days before the hearing;

7. to receive adequate notice at least thirty days prior to the commencement of recoupment: (1) explaining the reasons recoupment is sought; (2) apprising him that in the event he, in writing, requests reconsideration or waiver of the Secretary's initial overpayment and recoupment determination, the Administration will subsequently inform him of the form of review to which he is entitled pursuant to the opinion herein rendered; and (3) informing him that recoupment will not begin until his request has been finally disposed of by way of the required review procedure.[16]

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[16] The court in *Elliott* found the Secretary's form of notice deficient insofar as it failed to apprise recipients of the appropriate forms which must be completed in order to invoke the Administration's review procedures. To remedy the situation, the court ordered the Secretary to specify in his initial overpayment notice those forms the recipient must request from the local office to perfect his appeal rights. Although any written submission will trigger commencement of the Administration's reconsideration and/or waiver procedures, given the writing capabilities of many of these old-age and disabled beneficiaries and the subleties which may inhere in determining whether an oral hearing is required in any given situation, it would be prudent of the Secretary to furnish recipients information as to the forms involved in cases of this sort and encourage their utilization. We do not hold that providing information as to such forms is a matter of constitutional imperative, however.

It is to be noted that any recipient who fails to notify the local office of his desire to have his overpayment and recoupment determination reviewed within the thirty day period will be deemed to have waived his right to seek that review by way of written submissions or by way of an oral hearing.

The judgments of the district courts are affirmed in part and reversed in part, and the cases are remanded for the entry of new judgments consistent with this opinion.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-3118

DC# 734-73C2

FANNIE BUFFINGTON and FRANCES BINER, Individually and on behalf of all others similarly situated,
PLAINTIFFS-APPELLEES,

v.

CASPAR WEINBERGER, Individually and in his capacity as Secretary of the Department of Health, Education and Welfare, DEFENDANTS-APPELLANTS.

APPEAL from the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause

be, and hereby is AFFIRMED IN PART AND REVERSED IN PART, AND REMANDED.

A TRUE COPY
ATTEST:

[February 19, 1976]

EMIL E. MELFI, JR.
Clerk

by /s/ [Illegible]
Deputy

[SEAL]

Filed and entered October 1, 1975

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1611

DC# 72-3629

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all others similarly situated,
PLAINTIFFS-APPELLEES,

v.

CASPAR W. WEINBERGER, Individually and in his capacity as Secretary, United States Department of Health, Education and Welfare; etc., et al.,
DEFENDANTS-APPELLANTS.

APPEAL from the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED IN PART AND RE-

VERSED IN PART, AND REMANDED TO THE DISTRICT COURT.

A TRUE COPY
ATTEST:

[February 19, 1976]

EMIL E. MELFI, JR.
Clerk

by /s/ [Illegible]
Deputy

[SEAL]

Filed and entered October 1, 1975

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 72-3629

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all others similarly situated,
PLAINTIFFS

vs.

CASPAR WEINBERGER, Individually and in his capacity as Secretary, United States Department of Health, Education and Welfare; and SUNG DAI SEU, Individually and in his capacity as Pacific Area Manager, Social Security Administration, Department of Health, Education and Welfare,
DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under 42 U.S.C. § 404(a) and (b),[1] the Secretary of the Social Security Administration (hereinafter

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[1] § 404. Overpayments and underpayments

(a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

[Footnote continued on page 51a]

the "Administration") may effect or waive recoupment of overpayments made to social security recipients. The Administration has promulgated procedures and regulations governing recoupment and

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[1] [Continued]

(1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. A payment made under this subchapter on the basis of an erroneous report of death by the Department of Defense of an individual in the line of duty while he is a member of the uniformed services (as defined in section 410(m) of this title) on active duty (as defined in section 410(1) of this title) shall not be considered an incorrect payment for any month prior to the month such Department notifies the Secretary that such individual is alive.

(2) With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such underpaid person, or, if such person dies before payments are completed or before negotiating one or more checks representing correct payments, disposition of the amount due shall be made in accordance with subsection (d) of this section.

(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

waiver in its *Claims Manual* § 5503[2] and in the

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[2] The CLAIMS MANUAL § 5503(a) provides that standard form letters sent to recipients subject to recoupment contain:

(1) The incorrect payment made and how and when it occurred.
(2) The right to request reconsideration of the overpayment determination.
(3) The required recovery.
(4) The proposed adjustment or the demand for repayment where adjustment is not possible.
(5) The waiver provisions of the law (Social Security Act, secs. 204(b) or 1870(c)).
(6) The availability of partial adjustment or partial refund.
(7) The need to notify the DO [Department Office] promptly if the person feels that the circumstances in the case would justify reconsideration, waiver, partial adjustment, or partial refund.

§ 5503(b) provides:

Delay in Withholding Benefits to Recover Overpayments.

Before we start to adjust the overpayment against the benefits due a beneficiary, he or his payee will normally be given reasonable opportunity to contest the correctness of the determination or to establish that a basis exists for waiver or partial adjustment. The notice to the beneficiary will advise him that adjustment will be deferred for a longer period when the facts in a given case, including but not limited to time case is being being worked, cutoff dates, mailing time, etc., indicate that a 30-day period would be inadequate for consideration of the matter and reply by the beneficiary and reviewing office processing time.

The only exceptions to this rule are:

(1) the overpayment is based on an annual report by the beneficiary; or

[Footnote continued on page 53a]

Code of Federal Regulations, 20 C.F.R. §§ 404.901

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[2] [Continued]

(2) the overpayment results from the superendorsement procedures under Section 205(n) of the Act whereby payment of a combined check is made to the survivor. . . . In the above two situations immediate adjustment action is taken.

§ 5503(c) provides:

If the person responds raising some question about the correctness of the determination of overpayment, or raises a question about recovery, waiver or partial adjustment, the DO will obtain the necessary evidence and prepare a recommendation to the reviewing office for disposing of the case. *Thus, if the person liable requests reconsideration of the substantive determination and it appears that the determination will be affirmed, the DO will develop the possibility of waiver of adjustment or recovery of the overpayment at the same time it receives evidence to resolve the request for reconsideration. This is necessary since, if the substantive determination is affirmed the Reconsideration Determination will cover both issues* (§ 8737). (Emphasis original).

When development is initiated for reconsideration of the overpayment determination, for waiver, or for partial adjustment, withholding to recoup the overpayment will be further deferred and payment will be continued until development has been completed, if the beneficiary is otherwise entitled to benefits. If development will not be completed before the expiration of the initial 30-day deferral period, the DO will . . . advise the reviewing office.

After this case was heard, the Administration reported that by January 1, 1975, overpayments based on beneficiaries' annual reports [§ 5503(b)(1)] will not be an exception to the rule of § 5505(b).

et seq. (1973).[3] The Plaintiffs in this class action claim that these procedures and regulations deny them due process of law under the Fifth Amendment because their benefits are reduced or suspended without adequate notice of the reasons for the recoupment, without adequate notice of their right to reconsideration, waiver, or partial adjustment,[4] and without a hearing prior to the recoupment. Defendants contest the Plaintiffs' constitutional and jurisdictional claims.

Facts:

This court has divided the Plaintiff class into two subclasses. Represented by Plaintiffs Silva, Ortiz, and Vaquilar, the first subclass consists of all social security old-age beneficiaries, resident in the State of

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[3] §§ 404.901 *et seq.* of Social Security Administration Regulations No. 4, set forth a four-step administrative review including an initial determination (§ 404.905); a reconsidered determination (§ 404.914); an administrative hearing *de novo* before an independent administrative law judge (§ 404.917); review by the Appeals Council of the Social Security Administration, (§ 404.945). After exhaustion of these administrative remedies, 42 U.S.C. § 405(g) provides for judicial review.

The initial overpayment determination notice must state the basis of the determination and inform the recipient of his right to reconsideration (§ 404.907). The initial determination is final unless a written request for reconsideration is filed (§ 404.908). The reconsideration decision is final unless a hearing is requested in writing (§ 404.914).

[4] Partial adjustment is a recoupment method whereby part of monthly benefits are withheld. It is permitted (not mandated) by 20 C.F.R. § 404.502a if certain conditions are met.

Hawaii, whose exposure to recoupment is based upon their own annual earnings reports.[5] Represented by Plaintiffs Elliot, Gaines, and Yamasaki, the second subclass consists of all social security old-age and disability benefit recipients, resident in the State of Hawaii, whose exposure to recoupment is based upon evidence other than annual earnings reports.[6]

Named Plaintiffs of subclass one all received an Administration form letter indicating that based upon their annual earnings reports for the preceding year, a specified overpayment had occurred and that their subsequent benefit payments would be reduced or totally suspended over a specified period. There was some notice of the right to reconsideration and waiver.[7] Plaintiffs believed themselves to be not liable

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[5] Recipients of old age retirement benefits are required to file annual earnings reports; and under 42 U.S.C. § 403(b) and (f), their monthly benefits may be reduced if their reported annual earnings are in excess of specified levels. Disability recipients are not required to file annual earnings reports.

[6] The exposure of Plaintiffs Elliott and Gaines to recoupment is based upon the Administration's discovery of its own alleged error. Plaintiff Yamasaki's exposure is based upon information supplied to the Administration by the insurance carrier of her unemployment compensation insurance.

[7] The pertinent parts of the form letter are as follows:

> "If you believe that this determination is not correct, you may request that your case be reexamined. If you want the reconsideration, you must request it not later than 6 months from the date of this notice. You may make any such request through any social security office.

for any overpayment, not at fault in causing the overpayment, and unable to repay the amount due; they personally contacted local Social Security Administration offices within thirty days of receipt of the form letter. At that time, none were advised that appropriate forms requesting waiver, reconsideration, and partial adjustment were available to initiate administrative action, and none actually filed the re-

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If additional evidence is available, you should submit it with your request.

To recover the overpayment, we shall withhold your benefits beginning with the check you would normally receive in ————. The next check that you will receive after the full overpayment has been withheld will be for $——. It will be sent to you about ————. Thereafter, your regular monthly benefits of $—— will be resumed.

Under social security law, any overpayment must be withheld from benefits or paid back unless *both* of the following are true:

1. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correct, *and*
2. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security benefits; or it would be unfair for some other reason.

To decide whether repayment would cause you financial hardship, we shall need a statement of your assets, and monthly income, and expenses. If you think you meet both conditions, call, write, or visit any social security office within 30 days from the receipt of this letter. Please take this letter with you if you visit the office. Unless we hear from you within 30 days, we shall withhold benefits as indicated above."

quisite forms within thirty days.[8] Currently, the Administration has completed recoupment against two of these Plaintiffs while deferring recoupment against the other pending the disposition of this case. Plaintiffs of subclass one have done all that reasonably could be expected of them to exhaust their administrative remedies.[9]

Named Plaintiffs of subclass two received overpayment notices more than thirty days before recoupment was to begin. The notice to Plaintiff Elliott set forth that the overpayment determination was based

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[8] One Plaintiff (Vaquilar) did immediately ask for and receive a partial adjustment of the amount to be withheld monthly. Moreover, acting on advice of counsel, he completed and filed the requisite forms requesting waiver and reconsideration more than thirty days after receipt of the overpayment notice. However, trial testimony indicates that timely completion of the forms would not have changed the Administration's disposition of the first subclass cases.

[9] The general rule is that a litigant must exhaust his administrative remedies, if such remedies exist, before invoking federal jurisdiction. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). However, the exhaustion requirement is excused if a) the administrative remedy is wholly inadequate, and the federal question is plain, or b) exhaustion would cause irreparable harm, as by prejudicial delay. *See* Martinez v. Richardson, 472 F.2d 1121, 1125 (10th Cir. 1973) and authorities cited therein. *See also* Note, *Federal Jurisdiction Over Challenges To State Welfare Programs,* 72 COL. L. REV. 1404, 1438-40 (1972). In this case, exhaustion of administrative remedies is excused on either of the above grounds. The federal question is clear; obtaining administrative relief on the due process issues raised would be a lengthy process during which many of the aged and disabled Plaintiffs in both subclasses would suffer and some would die.

upon her receipt of both retirement and disability benefits when she was entitled to only disability benefits.[10] The notice to Plaintiff Gaines indicated that "duplicate payments" over specified dates was the reason for the overpayment finding.[11] The notice to Plaintiff Yamasaki specified "a processing error" as the cause of the overpayment.[12] All three named Plaintiffs received some notice of the right to reconsideration and waiver.[13] The Plaintiffs believed themselves to be not liable for any overpayment, not at fault in causing the overpayment, and unable to repay the amount claimed; they contacted local Administration offices within thirty days after receipt of the overpayment notice. At that time, none were advised that appropriate forms requesting waiver, reconsideration, and partial adjustment were available to instigate administrative action, and none actually filed the requisite forms within thirty days.[14] Presently, recoupment against Elliott and Gaines has been deferred pending a final disposition of this case,

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[10] Affidavit of Bernard Popick, para. 12.

[11] Plaintiff's Exhibit, P-15.

[12] Affidavit of Nancy Yamasaki, Exhibit A.

[13] The pertinent parts of the initial notice were virtually the same as those reprinted in note 7, *supra*.

[14] The three subclass two Plaintiffs, acting upon advice of counsel, eventually did complete and file the requisite forms after the initial thirty days had elapsed. Trial testimony indicates, however, that timely completion of the forms would not have altered the Plaintiffs' current status. *See also* note 9, *supra*.

while recoupment against Plaintiff Yamasaki has been completed. Plaintiffs of subclass two have done all that reasonably could be expected of them to exhaust their administrative remedies.

In summary, the Administration's regulations and procedures, and the Plaintiffs' histories in this case, show that recipients in both subclasses subject to recoupment receive recoupment notices which set out the basic reason for the recoupment, the possibility of reconsideration, the conditions for waiver, and the need to consult the local Administration office within thirty days if they wish to complain. For subclass one Plaintiffs, (at least until January, 1975), recoupment begins immediately after the initial overpayment decision is made. For subclass two Plaintiffs, the notice is sent thirty days before actual recoupment begins. In practice, actual adjustment may at the discretion of the Payment Center be extended beyond 30 days when more time is needed to consider and process the matter. After the first determination is made, if reconsideration or waiver is requested, recoupment is further deferred until those issues are determined on the basis of any documentary evidence submitted. Finally, a post-recoupment hearing is possible should the claimant wish to seek additional review.[15]

The initial overpayment and recoupment notice sent to beneficiaries does not set forth the forms

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[15] *See* 42 U.S.C. § 405(b) (1969), and 20 C.F.R. § 404.917 (1973).

needed for reconsideration and waiver, or information about how to complete them. The information and forms missing in the initial notice are not generally made available when the claimant consults his local Administration office. When reconsideration or waiver consideration is requested, the Administration's decision is based upon a claimant's *ex parte* presentation of documentary evidence on an issue which he may understand only nebulously. Many of these claimants are elderly and disabled people whose capacities may frustrate an effective documentary presentation of their case. No oral hearing is given prior to the beginning of recoupment, and any deferral of recoupment beyond 30 days after the date of the initial notice lies completely within the discretion of the Administration. Should a claimant convince the Administration to reverse itself *ex parte* on the overpayment issue, a reduced or suspended payment may ensue with a refund coming a month or more later.

Statistics provided by the Defendant [16] in this case indicate the following:

(a) In 1970 there were overpayments in approximately 1,250,000 cases.

(b) Of these 1,250,000 overpayments, there were requests for reconsideration in approximately 12,000 cases.

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[16] Affidavit of Bernard Popick, Director of the Bureau of Disability Insurance of the Social Security Administration, Department of Health, Education, and Welfare, para. 36.

(c) Of the 12,000 reconsideration determinations with respect to overpayments, there were approximately 8,250 reversals and approximately 3,750 affirmances.

(d) Of the 3,750 reconsideration affirmances with respect to overpayments, there were requests for hearing in approximately 1,600 cases.

(e) Of the 1,600 cases that went to hearing with respect to overpayments, there were reversals in approximately 560 cases and affirmances in 1,040 cases.

Stated another way, these statistics mean:

(a) less than one per cent of the beneficiaries in overpayment status contest the matter.

(b) Of those who do contest the initial overpayment determination, about sixty-nine per cent succeed in getting the Administration to reverse itself.

(c) about forty-three per cent of those whose overpayment status is affirmed upon reconsideration seek an oral (post-recoupment) hearing.

(d) of those who get an oral hearing, more than one-third succeed in getting the Administration to reverse itself.

(e) overall, of that small percentage of claimants questioning the overpayment determination, about seventy-three per cent (8,250 + 560 out of 12,000) finally succeed in obtaining relief.

It is quite clear from the above that when the claimant feels he has a strong enough case to question the Administration's initial overpayment determination,

there is a very substantial chance that the Administration will eventually reverse itself. What is saddest and perhaps most important about this fact is that many social security recipients, like the Plaintiffs here, depend upon their full monthly benefit payments for subsistence.[17] Erroneous recoupments often cause the aged and infirm drastic hardship.[18]

Jurisdiction:

The Defendants have moved for dismissal for lack of subject-matter jurisdiction. Plaintiffs assert that federal jurisdiction exists under 28 U.S.C. § 1331(a) (1966), 28 U.S.C. § 1361 (Supp. I, 1972), and 5 U.S.C. § 701 *et seq.* (1967) (hereinafter the "A.P.A."). While § 1361 [19] may have been intended to increase the availability of mandamus jurisdiction beyond that under common law,[20] even under the

[17] The Administration's own CLAIMS MANUAL § 5000 states, "Most people who get an RSDI check depend upon it for the necessities of life."

[18] For example, Plaintiff Elliott was forced to seek emergency welfare assistance from the State of Hawaii after her social security payment for June 1972 was withheld.

[19] § 1361 states: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty to the plaintiff."

[20] Whether § 1361 was supposed to expand mandamus jurisdiction beyond common law rules is an open question. *Compare* Burnett v. Tolson, 474 F.2d 877, 880 n. 5 and n. 6 (4th Cir. 1973) *with* Peoples v. U. S. Dept. of Agriculture, 427 F.2d 561, 565 (D.C. Cir. 1970). *See generally*, 7B J. MOORE, FEDERAL PRACTICE § 1361, at 536 (2d ed. 1973).

traditional rules for mandamus writs, § 1361 applies to this case.[21] At common law, mandamus would issue when three elements coexisted, namely, 1) a clear right in the plaintiff to the relief sought; 2) a clear duty on the part of the defendant to do the act in question; [22] and 3) the lack of another adequate remedy. *Carter* v. *Seamans*, 411 F.2d 767, 773 (5th Cir. 1969).

As to the third requirement, the Plaintiffs, if denied federal jurisdiction, may not have an adequate remedy elsewhere, *see Burnett* v. *Tolson*, *supra* note 20, at 82-83. The state courts may not be able to issue the requested injunctive relief, *see State of*

[21] The court does not decide the 28 U.S.C. § 1331(a) and 5 U.S.C. § 701 *et seq.* issues raised by the Plaintiffs, but notes in passing that support exists for either jurisdictional base. 5 U.S.C. § 706(2) applies to this case, and the A.P.A. has been viewed as a jurisdictional grant independent of other statutes. Bass v. Richardson, 338 F. Supp. 478, 482 (S.D. N.Y. 1971); (for authorities *pro* and *con*) *see generally*, Aguayo v. Richardson, 473 F.2d 1090, 1101-02 (2d Cir. 1973); Mills v. Richardson, 464 F.2d 995, 1001 n. 9 (2d Cir. 1972). Although the amount in controversy requirement may preclude § 1331(a) jurisdiction, some courts have indicated that when the deprivation of constitutional rights is at issue, the jurisdictional amount is automatically satisfied. *Accord*, Spoek v. *David*, 469 F.2d 1047 (3d Cir. 1972); Cortright v. Resor, 325 F. Supp. 797, 809 (E.D. N.Y. 1971). *Contra*, Lynch v. Household Finance Corp., 405 U.S. 538, 547 (1972). *See generally*, Burnett v. Tolson, *supra* note 20, at 880 n. 4.

[22] This traditional requirement is sometimes stated as a duty plainly and positively ascertained, and free from doubt. Wilber v. U.S. *ex rel.* Kadrie, 281 U.S. 206, 218-19 (1930); Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364, 367 (10th Cir. 1966).

Alabama v. *Rogers*, 187 F.Supp. 848, 852 (M.D. Ala. 1960); R. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L. J. 1385 (1964), and any removal to a federal court from a state court would lie within the defendants' sole discretion. Moreover, the first and second requirements are met when the application of a Supreme Court ruling to the instant case clearly shows the existence of plaintiff's constitutional right and its denial by the defendant. *Mead* v. *Parker*, 464 F.2d 1108 (9th Cir. 1972); *Burnett* v. *Tolson*, *supra* note 20; *Daigle* v. *Warner*, 348 F.Supp. 1074 (D.C. Hawaii 1972), *rev'd* on non-jurisdiction grounds, —— F.2d —— (9th Cir. 1973).[23] While the applicability of the relevant Supreme Court ruling should be beyond doubt in the opinion of the district court judge, it need not be so certain as to preclude a different opinion from another court. For example, in *Daigle*, *supra*, the Chief Judge of this District Court under § 1361 applied *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) to summary courts-martial. The Ninth Circuit later reversed, differing with the District Court's use of *Argersinger* without attacking its assertion of § 1361. In this case, the Plaintiffs rely upon *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (hereinafter "*Goldberg*") to establish the existence of the constitutional right to adequate notice and prior hearings in Administration recoupment cases. One court has already approved § 1361 jurisdiction and the application of *Goldberg* to the termination and recoupment of medicare benefits under Administration regulations similar to those involved in this case. *Martinez* v. *Richardson*, *supra* note 9. Accordingly, the applicability of *Goldberg* to this case is sufficiently apparent to establish for § 1361 jurisdictional purposes the plaintiff's clear right and the defendant's clear duty.[24]

[23] In *Mead*, a case wherein the adequacy of a prison library was challenged, the Ninth Circuit held that § 1361 jurisdiction applied because Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970) *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) had established constitutional standards for prison libraries. In *Burnett*, the Fourth Circuit asserted § 1361 jurisdiction in a case wherein the prior refusal to allow pamphlet distribution in a public area on a military base was said to be governed by Flower v. U.S., 407 U.S. 197 (1972) which declared unconstitutional the arrest (under 18 U.S.C. § 1382) of a leafleteer previously barred from a military base.

[24] In Knuckles v. Weinberger, —— F. Supp. —— (N.D. Cal. (1973), wherein the regulations under § 404 of the Act were challenged on due process grounds, Judge Wollenberg distinquished the *Mead* case, and ruled that § 1361 jurisdiction did not exist because the applicability of *Goldberg* to this type of case was not certain enough to support mandamus jurisdiction. With all due respect to Judge Wollenberg, I disagree that the application of *Goldberg* is unclear, and that *Mead* is distinguishable. The court's awareness in *Mead* that the library in question was more deficient than the one in *Gilmore* does not necessarily reflect an understanding that § 1361 jurisdiction applies only when the constitutional infirmity is absolutely identical to (in kind) and exceeds (in degree) that ruled upon in a Supreme Court case. Rather the awareness of the greater library deficiency in *Mead* may have been directed towards the statement of claim issue in the case: "We have no doubt that, under *Gilmore* v. *Lynch*, *supra*, and *Johnson* v. *Avery* 1969, 393 U.S. 483, 89 S.Ct. 747, 21 L.E.2d 718, the named petitioners have stated a prima facie case under both theories," *supra*, at 1111. When discussing § 1361

Due Process and Hearings Prior to Recoupment:

Goldberg establishes the principle that when the impact of an erroneous administrative decision upon the individual is so severe as to deprive him of the means by which to live, due process requires that the individual have an opportunity to be heard and to cross-examine witnesses before any adverse decision is effected. Specifically, *Goldberg* held that a hearing had to be afforded the individual before his state welfare benefits were terminated. In reaching its decision, the *Goldberg* Court focused upon three considerations: The impact of an erroneous decision upon the individual, the government's interest in fulfilling the purpose of welfare legislation by protecting against administrative mistakes, and the government's interest in conserving the public fisc and minimizing administrative burdens. The *Goldberg* Court found that "termination of [welfare] aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits," at 264. It also found that important governmental interests were served by ensuring that welfare was given to eligible recipients without interruption. Finally, it found that

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jurisdiction, the *Mead* court stated (without mentioning *Gilmore*) that although § 1343 would not apply, . . . "the wrong done, if any, is just as much a violation of the federal Constitution as if done by a state official," *supra*, at 1111. The court's qualification of the wrong by "if any" suggests that the Plaintiff's right and the Defendant's duty need not be as absolutely certain as Judge Wollenberg would seem to require.

the additional burden on the government's administration and fisc did not outweigh the first two considerations in favor of providing a prior hearing.

The application of *Goldberg* to this case is simply inescapable.[25] Since most social security recipients

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[25] In Richardson v. Wright, 405 U.S. 208 (1972) (Brennan, Douglas, and Marshall, JJ., dissenting), three Justices dissented to the Court's decision to decline ruling on the application of *Goldberg* to the termination of social security disability benefits. The dissenters also expressed the view that *Goldberg* should be so applied. *Accord*, Note, *Procedural Due Process and the Termination of Social Security Disability Benefits*, 46 S. CAL. L. REV. 1263 (1973). *Goldberg* has also been applied in public housing cases. *See e.g.*, Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971).

The cases cited by the Defendant are clearly distinguishable. It is true that in Kelly v. Wyman, 294 F.Supp. 893, 901 n. 20 (S.D. N.Y. 1968), *aff'd sub nom. Goldberg*, the court did suggest in *dicta* that its ruling might not apply to the federally administered Old-Age, Survivors, and Disability Insurance Program. However, this was not an issue in the case, and the Supreme Court in *Goldberg* expressed no opinion on the issue. In Torres v. N.Y. State Dep't. of Labor, 333 F.Supp. 341 (S.D. N.Y. 1971), *aff'd*, 405 U.S. 949, *reh. denied* —— U.S. ——, 41 U.S.L.W. 3475 (March 6, 1973), the court ruled that due process did not require a hearing prior to the suspension or termination of unemployment benefits; but in that case, the two named Plaintiffs were afforded a hearing prior to termination of their benefits, and new regulations made the issue moot as to other plaintiffs. Messer v. Finch, 314 F.Supp. 511 (E.D. Ky. 1970) held that social security disability benefits could be suspended without a prior hearing, but that judgment was vacated for mootness, 400 U.S. 987 (1971). Anderson v. Finch, 322 F.Supp. 195 (N.D. Ohio 1971) refused to apply *Goldberg* to social security benefits. The Sixth Circuit remanded

depend upon their full benefits for the necessities of life,[26] the adverse impact of an erroneous suspension or reduction upon them is great.[27] Starvation

for reconsideration in light of *Goldberg*. 454 F.2d 596 (6th Cir. 1972).

Recently, when the recipient of unemployment compensation was given an informal personal interview prior to the termination of benefits and the record reflected the absence of a factual dispute or the misapplication of rules and regulations, the Ninth Circuit reversed the lower court and held that a full evidentiary hearing prior to benefit termination as in *Goldberg* was not required. Crow v. Cal. Dep't. of Human Resources Dev., No. 71-1045 (9th Cir., Dec. 14, 1973). The court distinguished *Goldberg* on the grounds that "grievous loss" was not involved in terminations of unemployment compensation. Crow is clearly inapplicable to the case at hand: The Plaintiffs received no prior informal hearing and this court has found that recipients of social security benefits are likely to suffer "grievous loss" when benefits are erroneously terminated.

[26] *See* note 17, *supra*.

[27] The Supreme Court has found an adverse impact sufficient to impose a prior hearing requirement in circumstances far less dire than when necessities of life are concerned, namely, when a deprivation of property was involved. Though a hearing was afforded only three days after the repossession of goods (*i.e.*, a stove and stereo), the Court held that due process was violated because there was no hearing prior to the repossession. Fuentes v. Shevin, 407 U.S. 67 (1972). Similarly, when a state revoked the license of uninsured motorists involved in accidents and the only prior hearing given did not consider the motorist's possible fault, the Court ruled, ". . . before the State may deprive petitioner of his driver's license and vehicle registration it must provide a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident." Bell v. Burson, 402 U.S. 535, 542 (1971).

may be slower if benefits are reduced or suspended rather than terminated as in *Goldberg*,[28] but some recipients will suffer nonetheless. As the *Goldberg* Court noted, the government has an interest in welfare as a guard "against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity," at 265. So is the Social Security Act ". . . designed for the protection of society, and enacted to alleviate the burdens which rest on large numbers of the population because of the insecurities of modern life, particularly those accompanying old age, unemployment, and disability, . . ." *Sayers* v. *Gardner*, 380 F.2d 940, 942 (6th Cir. 1967).[29] As with welfare, the same governmental interests that counsel the provision of social security benefits, counsel as well its uninterrupted provision to those eligible to receive it, and pre-recoupment hearings are indispensable to that end. *See Goldberg*, at 265. Finally, *Goldberg* suggests that the government's objection to pre-recoupment

[28] It has been suggested that *Goldberg* may be distinguishable from other cases because it involved terminations of benefits, not reductions. *See* Wheeler v. Montgomery, 397 U.S. 280, 284-85 (1970) (Chief Justice Burger dissenting); Daniel v. Goliday, 398 U.S. 73 (1970). However, at least one court has intimated that reductions in grants as recoupment for past advances would be covered by *Goldberg*. Hagans v. Wyman, 462 F.2d 928 (2d Cir. 1972), *cert.* to 2d Cir. *granted sub nom.* Hagans v. Lavine, —— U.S. ——, 37 L. Ed.2d 396 (1973).

[29] *See also* Note, *Procedural Due Process and The Termination of Social Security Disability Benefits, supra* note 25.

hearings on administrative and fiscal burden grounds cannot outweigh the arguments in favor of such hearings.[30] This seems especially true in this case: The Administration's own statistics indicate that only a small percentage of overpayment cases will need to be contested beyond the "paper" hearing stage.[31] Pre-recoupment hearings may also reduce the number of post-recoupment hearings necessary.[32]

There are other compelling reasons why the mandate of *Goldberg* must be applied to social security cases. At the heart of the right to due process lies

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[30] ". . . fiscal considerations are always relevant, but seldom if ever decisive in cases of this sort." Crow v. Cal. Dep't. of Human Resources, 325 F. Supp. 1314, 1317 (N.D. Cal. 1970) (termination of unemployment compensation without a prior hearing), *cert. denied* 408 U.S. 924 (1972), *rev'd* on other grounds, —— F.2d —— (9th Cir. 1973).

[31] *See* text accompanying note 16, *supra*. While the court finds that a prior oral hearing is constitutionally necessary when requested, the Administration may still use its current "paper" hearing wherein documents filed by the claimant are reviewed to select out those cases which may be reversed without a hearing. The Administration has claimed that the increased cost of continuing benefits until a hearing is had could be $35 million. However, this figure makes two dubious assumptions, namely that everyone subject to recoupment will request a hearing, and that all will take two years to complete the appeals process. The first assumption is questionable in light of current statistics on recipients who contest overpayment determination. *See* text accompanying note 16, *supra*. The second "two year" assumption assumes that the current time for the full appeals process could not be shortened somewhat by the Administration itself.

[32] *Compare,* Richardson v. Wright, *supra* note 25, at 223 (dissenting opinion).

the recognition of the need for a fair determination of issues and the hope of minimizing mistakes. In this case, the chance of administrative error is great.[33] In *Kelly* v. *Wyman, supra* note 25, the district court was impressed by the fact that post-termination hearings resulted in administrative reversals 36% of the time; in this case, reversals at the post-recoupment hearing stage occur more than one-third of the time.[34] Furthermore, the procedural safeguards which *Goldberg* found constitutionally insufficient for lack of a prior hearing were more stringent than those of the Administration.[35] It is thus not surprising that one court has approved the application of *Goldberg* to procedures similar to those here at issue. *See Martinez* v. *Richardson, supra* note 9. *But see Mills* v. *Richardson, supra note* 21, at 1001 (*dicta*).

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[33] *See* text accompanying note 16, *supra*. These figures of course should not be taken to impugn the competence of the Administration; rather, they attest to its fairness and the complexity of making initial overpayment determinations.

[34] *See* text accompanying note 16, *supra*.

[35] Under the procedure challenged in *Goldberg,* a welfare termination decision was made only after the recipient discussed the case with a caseworker, (a safeguard not present in this case). A unit supervisor then reviewed the caseworker's termination decision. If the supervisor concurred, the recipient was given seven days to request another review by a higher official. Like the Plaintiffs here, the welfare recipient could submit a written statement supporting his case to this higher official. If the higher official felt termination was unwarranted, welfare aid stopped immediately. The welfare recipient, like the Plaintiffs here, could then request a post-termination hearing.

Attempts to distinguish *Goldberg* on the ground that fact issues are not present in recoupment cases, or on the ground that the evidence involved is more reliable, are futile. Issues of fact arise in virtually all contested recoupment situations.[36] To predict when an issue of fact will not be present on a case by case basis is impossible. Although the district court in *Kelly* v. *Wyman, supra* note 25, at 905, may have been influenced in its decision by the fact that welfare terminations sometimes were based upon rumors or "tips", the *Goldberg* Court did not base its decision on the possibility that flimsy evidence might underlie a termination decision. However reliable the evidence may be, when the adverse administrative determination depends upon the resolution of factual issues and the application of legal rules to

[36] The *Goldberg* Court apparently limited its holding to situations where issues of fact are present, at 268 n. 15. However, subsequent cases suggest that hearings are required by due process even if no issues of fact are present. In Yee-Litt v. Richardson, 353 F. Supp. 996 (N.D. Cal. 1973), *aff'd* —— U.S. ——, 93 S.Ct. 2753, 37 L.Ed.2d 152 (1973) the plaintiffs challenged on due process grounds a California regulation which authorized the termination of welfare aid whenever a Chief Referee determined that only issues of policy and no issues of fact or judgement were present. Judge Carter held that under *Goldberg* this regulation violated due process "because of the inherent difficulties in using this fact policy distinction," at 999. Similarly, in Mother's & Children's Rights Organization v. Sterrett, 467 F.2d 797 (7th Cir. 1972), the Court held that even when welfare benefit terminations were based upon pure questions of law, reasonable opportunity for argument had to be given, although a full evidentiary hearing was not necessary.

the facts found that is enough to invoke due process hearing requirements.[37]

Therefore, the court finds that the Administration's recoupment regulations and procedures here challenged violate the Plaintiff's right to due process of law, and orders that henceforth when requested [38] the Plaintiffs of both subclasses be given an oral hearing prior to recoupment.[39] At the hearing, the correctness of the overpayment determination and the recipient's statutory right to waiver under 42 U.S.C. § 404(b) (1969) must be examined. However, since under 20 C.F.R. § 404.502(c) (1973), partial adjustment is not a mandate, but lies within the un-

[37] *See* Richardson v. Wright, *supra* note 25, at 216 (dissenting opinion).

[38] The Plaintiffs due process right to a hearing may of course be waived by them. It is for the Administration to decide whether obtaining written waivers of the right to a hearing in all, some, or no cases is advisable, but the court notes in passing that written waivers would minimize litigation over whether a recipient knowingly and intelligently decided not to request a hearing.

[39] At first blush the need for a prior hearing in annual report cases (subclass one) may be doubtful because the reports are filed by the claimants themselves and overpayments are determined by the mechanical application of a statutory earnings standard. However, this is but another way of saying that annual report cases involve "more reliable" evidence than others. Even if this supposed reliability were a factor, nothing makes a report more unreliable than when its own author says it is a mistake. In fact, it may be that because overpayments based on annual reports present relatively straight forward fact issues, the claimant will seek an oral hearing only when a mistake is clear.

fettered discretion of the Administration even when the requisite conditions are met, a hearing need not be given on the partial adjustment issue.[40]

The pre-recoupment hearing need not take the form of a judicial or quasi-judicial trial, but it must allow the claimant to present his case orally, to submit evidence with witnesses or documents, and to cross-examine witnesses against him. Representation by legal counsel or other persons is neither required nor prohibited. The hearing officer should

[40] The Plaintiffs have no due process right to a hearing on partial adjustment because they have no protected property interest in it. In Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), when a university did not rehire a teacher and was under no contractural, statutory, administrative or other obligation to decide the rehiring issue according to any procedure or standard, but could exercise its unfettered discretion, the Court held that the teacher had no constitutional right under the Fourteenth Amendment to a statement of reasons and a hearing on the university's decision not to rehire him. The Court indicated that a right to procedural due process exists only when a protected interest of liberty or property is involved. As to a protected property interest, the Court stated, "To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it," at 577. There is no interest of liberty at stake in a partial adjustment determination; and even if a claimant meets the conditions for partial adjustment, he has no "legitimate claim of entitlement to it" since the Administration in its discretion can still rule against him.

Furthermore, since no due process right covers the partial adjustment problem, this court cannot say that partial adjustment or the form needed to file for it, must as a constitutional matter be mentioned in the initial overpayment notice.

not have participated in making the determination under review; he should base his decision solely on the legal rules and evidence adduced at the hearing; he should state the reasons for his decision and the evidence relied upon. *Goldberg*, at 266-71.

Due Process and Notice:

Since a constitutional right can be waived only knowingly, the Plaintiffs must be notified of their due process right to request and receive a pre-recoupment hearing on the overpayment and waiver issues. Notice of that right must be stated plainly and obstrusively in the initial overpayment letter. Furthermore, the initial notice must describe the claimant's right at any hearing to be represented by a lawyer or other person, present evidence, present witnesses in his behalf, cross-examine adverse witnesses, be afforded a fair and impartial hearing examiner, examine all documents prior to and during the hearing, and be given a prompt decision by the decisionmaker.

Due process also requires timely, adequate, and detailed notice of the reasons for an initial overpayment determination. *Goldberg*, at 267. In *Goldberg*, the Court found, "New York employs both a letter and a personal conference with a caseworker to inform a recipient of the precise questions raised about his continued eligibility. Evidently the recipient is told the legal and factual bases for the Department's doubts. This combination is probably the most effective method of communicating with

recipients," at 268. Since the Administration's current procedures do not include a caseworker interview, the social security recipient may not be as fully apprised of the legal and factual bases for the overpayment finding as the welfare recipient was in *Goldberg*.

In annual report overpayment cases involving subclass one Plaintiffs, the recipients are presumed to be familiar with their own reports and the reasons for filing them. The reverse side of the current initial notice explains basically how withheld amounts are determined, and the notice's invitation to consult local Administration offices when questions arise is a necessary and added protection. Subclass two Plaintiffs present a more difficult notice problem. The myriad circumstances and diverse information which may underlie an overpayment determination make it impossible for this court to define what is and is not adequate notice for all subclass two cases. To indicate (as the reason for the overpayment decision) a "duplicate payment" over specified periods may be enough notice for the claimant, but a stated reason such as "processing error" may not be.[41] However, it is reasonable to assume that subclass two Plaintiffs, and subclass one Plaintiffs, who doubt the overpayment, will consult their local Administration office for clarification.

However, in light of the foregoing, the Administration's initial notice does not complete its duty to

[41] *See* text accompanying notes 11-12, *supra*.

inform the subclass one and two Plaintiffs about the reasons for an overpayment determination. Those Plaintiffs who consult their local Administration office to contest or inquire about the alleged overpayment must receive any additional information which the Administration has.[42] The Administration must inform the Plaintiffs requesting a hearing about all the pertinent details, laws, and regulations supporting the Administration's case far enough in advance to afford the claimant sufficient time to prepare for the hearing.[43]

Finally, while the Administration's current notice adequately informs the recipient of the possibility of reconsideration and waiver, it does not indicate what requisite forms must be completed. The record indicates that even those recipients seeking aid at a local office are not provided with information about or copies of the reconsideration and waiver forms. These deficiencies must be remedied. Claimants fail-

[42] Normally when an administrative agency is about to take action adverse to a citizen, due process requires that the citizen be informed of the evidence upon which the agency relies so that he can rebut that evidence effectively. *See* Langevin v. Chenango Court, Inc., 447 F.2d 296, 300 (2d Cir. 1971); Escalera v. N. Y. City Housing Authority, 425 F.2d 853, 862 (2d Cir. 1970); *cert. denied*, 400 U.S. 853 (1970).

[43] While the text for procedural due process is one of fundamental fairness in the light of the total circumstances, due process always requires that a reasonable opportunity be given the individual to prepare for and meet the case against him. *See e.g.*, Whitfield v. Simpson, 312 F.Supp. 889, 894 (E.D. Ill. 1970).

ing to file the required forms may lose their case for failure to comply with administrative procedures. Therefore, the initial overpayment notice should specify the reconsideration and waiver forms which must be requested from the local office. The local office also has the duty to inform inquiring claimants about the requisite forms, to provide them with those forms if requested, and to assist in their completion. Accordingly:

Judgment may be entered providing that Defendant Weinberger, his successor, his agents and employees at the Social Security Administration's Payment Centers, and all persons in active concert or participation with them shall be restrained and enjoined from reducing, terminating, or suspending social security old age and disability benefits accruing to Plaintiffs and their class without affording them an opportunity for a hearing before any reduction, termination, or suspension is effectuated;

That Defendant Weinberger, his successors, his agents and employees at the Social Security Administration's Payment Centers, and all persons in active concert or participation with them shall restore any and all money withheld since June 22, 1972, without a prior hearing, from Plaintiffs NANCY YAMASAKI, ISABELLE ORTIZ, JOHN V. VAQUILAR, RAYMOND GAINES, and JORDAN S. SILV pending the holding of a pre-adjustment hearing in each of their individual cases;

That the Defendants shall submit to this court, for its approval, a copy of the proposed notice to be

given to the members of the class informing them of the judgment herein, and a copy of the revised rules, regulations, and procedures which they will adopt to conform with the dictates of the judgment herein; and

That this court will retain jurisdiction over this case to order any further action it may deem appropriate and just in light of the decision herein.

The foregoing constitutes the Findings of Fact and Conclusions of Law required by Rule 52(a) of the Federal Rules of Civil Procedure.

DATED: Honolulu, Hawaii, February 4, 1974.

/s/ Samuel P. King
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil Action File No. 72-3629

EVELYN ELLIOTT, ET AL, PLAINTIFFS

vs.

CASPAR WEINBERGER, ET AL, DEFENDANTS

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable SAMUEL P. KING, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged: Judgment be entered in favor of Plaintiffs.

Dated at Honolulu, Hawaii, this 19th day of February, 1974

/s/ Walter A.Y.H. Chinn
WALTER A.Y.H. CHINN
Clerk of Court

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON, AT SEATTLE

Civil Action No. 734-73C2

[Filed October 22, 1974]

FANNIE BUFFINGTON and FRANCES BINER, individually and on behalf of ALL OTHERS SIMILARY SITUATED, PLAINTIFFS

—*vs.*—

CASPAR WEINBERGER, Secretary of Health, Education, and Welfare, DEFENDANT

SUMMARY JUDGMENT

This action having come on regularly for hearing before this Court on cross-motions for summary judgment, plaintiffs being represented by Jeff Spence, of Seattle Legal Services, and defendant being represented by Charles Mansfield, Assistant United States Attorney, and Richard Wetmore, Assistant Regional Attorney, Department of Health, Education, and Welfare, the Court having considered the documents in the file and the arguments of counsel and being fully advised, now hereby ORDERS that:

1. This Court has jurisdiction over the subject matter of this lawsuit, pursuant to 28 USC § 1361, and 5 USC § 701 *et seq.*

2. Defendant, his successors, his agents, employees and all persons in active concert or participation with them shall be restrained and enjoined from reducing or adjusting social security benefits accruing to plaintiffs and their class pursuant to 42 USC § 402 without affording them an opportunity for a hearing before any recoupment or adjustment is effected.

3. The hearing shall be conducted by an employee of the Social Security Administration who has had no prior knowledge of the events leading to the determination of overpayment and decision to recover such overpayment or adjust the beneficiary's payments. The decision maker shall issue a written decision, a copy of which will be sent to the beneficiary, and representative if any. The decision maker shall specify findings of fact and conclusions in support of the decision, and in particular shall state the basis for a finding of overpayment and whether there was fault on the part of the beneficiary. If there is no fault, the decision shall indicate whether recovery of the overpayment will defeat the purpose of Title II of the Social Security Act or be against equity and good conscience, as those terms are defined by the applicable regulations promulgated by the Social Security Administration. A notice advising a beneficiary of his or her right to appeal the decision will be mailed with a copy of the decision.

4. The requirements of such hearing shall include at least the following:

a. The recipient shall have the opportunity to personally appear, be heard, and cross-examine any witnesses;

b. The recipient shall have the opportunity to be represented by an attorney or other representative;

c. The recipient shall have the opportunity to submit documentation for consideration at the hearing;

d. The recipient shall have the opportunity to examine his or her claim file at least five days prior to the date of hearing;

e. No transcript is required to be made of the hearing.

5. Any party aggrieved, in whole or in part, with the decision of the decision maker shall have the right to further administrative appeal.

6. Defendant, his agents and employees and all persons in active concert or participation with them shall be restrained and enjoined from recouping or adjusting social security benefits accruing to plaintiffs and their class pursuant to 42 USC § 402 without affording them adequate notice of their opportunity for a pre-adjustment hearing described above and of any other administrative relief to which they may be entitled. If a request for a pre-adjustment hearing is not made within thirty (30) days of the date of mailing of the notice the beneficiary shall be presumed to have waived his or her right to the hearing.

7. Such notice shall include at least the following:

a. A statement of alleged overpayment, an explanation of basis for overpayment, and proposed action for recoupment of the overpayment;

b. A statement of beneficiary's right to hearing;

c. Instructions and forms for requesting a hearing including an explanation that if a hearing is not requested recoupment of the alleged overpayment will begin;

d. A statement of any other administrative relief, such as waiver or partial adjustment;

e. A statement that local office will assist recipient in completing and submitting the forms.

8. All benefits which have been withheld from the named plaintiffs shall be restored pending the opportunity for a hearing as described above.

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APPENDIX E

I. PERTINENT PROVISIONS OF THE SOCIAL SECURITY CLAIMS MANUAL

Section 5503(a) provides in pertinent part:

> When it is determined that an incorrect payment has been made, the person liable should be notified in writing (see § 5508 for sample letters). The notice will inform the person of:
>
> "(1) The incorrect payment made, how, and when it occurred. (If the overpayment resulted from the entitlement of another beneficiary, the adversely affected individual(s) must be informed of the name, relationship to the WE, and basis for entitlement of the new beneficiary.)
>
> "(2) The right to request reconsideration of the overpayment determination.
>
> "(3) The required recovery.
>
> "(4) The proposed adjustment or the demand for repayment where adjustment is not possible.
>
> "(5) The waiver provisions of the law (Social Security Act, secs. 204(b) or 1870(c)).
>
> "(6) The availability of partial adjustment or partial refund.
>
> "(7) The need to notify the DO promptly if he feels that the circumstances in his case would justify waiver, partial adjustment, or partial refund."

Section 5503.3 provides in pertinent part:

> Delay in Withholding Benefits to Recover Overpayments. Before we start to adjust the overpayment against the benefits due a bene-

ficiary, he or his payee will normally be given reasonable opportunity to contest the correctness of the determination or to establish that a basis exists for waiver or partial adjustment. The notice to the beneficiary will advise him that adjustment will be deferred for a longer period when the facts in a given case, including but not limited to time case is being worked, cutoff dates, mailing time, etc., indicate that a 30-day period would be inadequate for consideration of the matter and reply by the beneficiary and reviewing office processing time.

The only exceptions to this rule are:

"(1) the overpayment is based on an annual report by the beneficiary;[*] or

[* The Social Security Administration now provides the 30-day deferral period to this class of beneficiaries also.]

"(2) the overpayment results from the super-endorsement procedures under Section 205(n) of the Act whereby payment of a combined check is made to the survivor . . . In the above two situations immediate adjustment action is taken."

Section 5503.5 provides in pertinent part:

If the person responds raising some question about the correctness of the determination of overpayment, or raises a question about recovery, waiver or partial adjustment, the DO will obtain the necessary evidence and prepare a recommendation to the reviewing office for disposing of the case. *Thus, if the person liable requests reconsideration of the substantive determination and it appears that the determination will be affirmed, the DO will develop the possibility of waiver of adjustment or recovery of the overpayment at the same time it receives evidence to resolve the request for reconsideration. This is necessary since, if the substantive determination is affirmed the Reconsideration Determination will cover both issues (§ 8737).* Where reconsideration of the overpayment determination, waiver, or partial adjustment development is initiated, witholding to recoup the overpayment will be further deferred and payment will be continued until development has been completed, if the beneficiary is otherwise entitled to benefits. If development will not be completed before the expiration of the 30-day period, the DO will utilize teletype to advise the reviewing office. (Emphasis in original)

II. Pertinent Provisions of the Code of Federal Regulations, Title 20

20 C.F.R. Part 404 provides in pertinent part:

§ *404.907 Notice of initial determination.*

Written notice of an initial determination shall be mailed to the party to the determination at his last known address, except that no such notice shall be required in the case of a determination that a party's entitlement to benefits has ended because of such party's death (see § 404.905(d)). If the initial determination disallows, in whole or in part, the application or request of a party, or if the initial determination is to the effect that a husband, widower, or parent was not receiving the requisite support from an insured individual, or that a party's entitlement to benefits has ended, or that a re-

duction, deduction, or adjustment is to be made in benefits or a lump sum, or that a period of disability established for a party has terminated, the notice of the determination sent to the party shall state the basis for the determination. Such notice shall also inform the party of the right to reconsideration (see § 404.910). Where more than the correct amount of payment has been made, see § 404.502a.

[37 F.R. 10554, May 25, 1972]

§ *404.908 Effect of initial determination.*

The initial determination shall be final and binding upon the party or parties to such determination unless it is reconsidered in accordance with §§ 404.910-404.916, or it is revised in accordance with § 404.956.

§ *404.909 Reconsideration and hearing.*

Any party who is dissatisfied with an initial determination may request that the Administration reconsider such determination, as provided in § 404.910. If a request for reconsideration is filed, such action shall not constitute a waiver of the right to a hearing subsequent to such reconsideration if the party requesting such reconsideration is dissatisfied with the determination of the Administration made on such reconsideration; and a request for a hearing may thereafter be filed, as is provided in § 404.917.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ *404.910 Reconsideration; right to reconsideration.*

The Administration shall reconsider an initial determination if a written request for reconsideration is filed, as provided in § 404.911, by or for the party to the initial determination (see § 404.905). The Administration shall also reconsider an initial determination (unless the determination is with respect to the revision of the Administration's earnings records) if a written request for reconsideration is filed, as provided in § 404.911, by an individual as a wife, widow, divorced wife, surviving divorced wife, surviving divorced mother, husband, widower, child, parent, individual alleging equitable entitlement to a lump sum, or representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to monthly benefits, a lump sum, a period of disability, or entitlement to hospital or supplementary medical insurance benefits, may be prejudiced by such determination. The Administration shall also reconsider an initial determination relating to the revision of the Administration's record of the earnings (see § 404.905(g)) of a deceased individual if a written request for reconsideration is filed, as provided in § 404.911, by a person as a widow, divorced wife, surviving divorced wife, surviving divorced mother, widower, child, parent, an individual alleging equitable entitlement to a lump sum, or representative of the decedent's estate.

[31 F.R. 16766, Dec. 31, 1966]

§ *404.911 Time and place of filing request.*

The request for reconsideration shall be made in writing and filed at an office of the Administration or, in the case of an individual in the Philippines, at the Veterans' Administration Regional Office in the Philippines or, in the case of an individual having 10 or more years of service in the railroad industry (see Subpart O of this Part 404) or of an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing reconsideration with respect to his application to establish a period of disability under section 216(i) of the act, at an office of the Railroad Retirement Board, within 6 months from the date of mailing notice of the initial determination, unless such time is extended as provided in § 404.612 or § 404.953.

[25 F.R. 6468, July 9, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ *404.912 Parties to the reconsideration.*

The parties to the reconsideration shall be the person who was the party to the initial determination (see § 404.905), and any other person referred to in § 404.910 upon whose request the initial determination is reconsidered.

§ *404.913 Notice of reconsideration.*

If the request for reconsideration is filed by a person other than the party to the initial determination, the Administration shall, before such reconsideration, mail a written notice to such

party at his last known address, informing him that the initial determination is being reconsidered. In addition, the Administration shall give such party a reasonable opportunity to present such evidence and contentions as to fact or law as he may desire relative to the determination.

[25 F.R. 1677, Feb. 28, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ *404.914 Reconsidered determination.*

The Administration shall, when a request for reconsideration has been filed, as provided in §§ 404.910 and 404.911, reconsider the initial determination in question and the findings upon which it was based; and upon the basis of the evidence considered in connection with the initial determination and whatever other evidence is submitted by the parties or is otherwise obtained, the Administration shall make a reconsidered determination affirming or revising, in whole or in part, the findings and determination in question.

[25 F.R. 1677, Feb. 28, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ *404.915 Notice of reconsidered determination.*

Written notice of the reconsidered determination shall be mailed to the parties at their last known addresses. The reconsidered determination shall state the basis therefor and inform the parties of their right to a hearing (see § 404.917).

§ *404.916 Effect of reconsidered determination.*

The reconsidered determination shall be final and binding upon all parties to the reconsideration unless a hearing is requested in accordance with § 404.918 and a decision rendered or unless such determination is revised in accordance with § 404.956.

§ *404.917 Hearing; right to hearing.*

An individual has a right to a hearing about any matter designated in § 404.905, if:

(a) An initial determination and a reconsideration of the initial determination have been made by the Administration; and

(b) The individual is a party referred to in § 404.919 or § 404.920; and

(c) The individual has filed a written request for a hearing under the provisions described in § 404.918.

[31 F.R. 16766, Dec. 31, 1966]

III. Pertinent Statutory Provision

42 U.S.C. 404:

OVERPAYMENTS AND UNDERPAYMENTS

(a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

(1) With respect to payment to a person more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. A payment made under this subchapter on the basis of an erroneous report of death by the Department of Defense of an individual in the line of duty while he is a member of the uniformed services (as defined in section 410(m) of this title) on active duty (as defined in section 410(*l*) of this title) shall not be considered an incorrect payment for any month prior to the month such Department notifies the Secretary that such individual is alive.

(2) With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such underpaid person, or, if such person dies before payments are completed or before negotiating one or more checks representing correct payments, disposition of the amount due shall be made in accordance with subsection (d) of this section.

(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recov-

ery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

* * * *

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